

JUDGING AS NUDGING: NEW GOVERNANCE APPROACHES FOR THE ENFORCEMENT OF CONSTITUTIONAL SOCIAL AND ECONOMIC RIGHTS

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ABSTRACT

There is little agreement among legal thinkers about whether and how courts can competently and legitimately enforce constitutional social and economic rights (SERs). The principal concern is that judicial enforcement would require courts to design and manage costly social welfare programs, tasks for which judges lack the requisite democratic mandate and institutional expertise. However, courts have been increasingly willing to enforce SERs in recent years while remaining mindful of limits on their institutional capacity to do so. This article classifies and critiques the dominant ways that such courts—primarily in Canada, the United States, and South Africa—enforce SERs. It concludes that the prevailing approaches are weakest where governments have done the least to fulfill their constitutional SER obligations. Further, this article identifies emerging approaches that require structured accountability in government efforts toward SER realization. It suggests that these approaches, understood within the context of new governance or

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“experimentalist” theory, better provide for the effective, coherent, and competent enforcement of SERs in the face of government recalcitrance than do the prevailing tools. The paper concludes with a case study assessing the usefulness of experimentalist SER enforcement with reference to a possible right to health under the Canadian Constitution.

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INTRODUCTION

Most new constitutions protect a number of so-called social and economic rights (SERs),¹ such as rights to education, housing,

1. I note at the outset the problem of defining social and economic rights. The current sharp distinction frequently drawn between civil and political rights, on the one hand, and social, economic, and cultural rights, on the other, can be traced in part to the creation, after the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/777, at 71 (Dec. 10, 1948), of two separate international human rights treaties—the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter “ICCPR”] and the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 999 U.N.T.S. 3 [hereinafter “ICESCR”]. However, I do not confine my discussion to the rights catalogued in these international instruments because I am

health care, welfare and the like.² But there is little agreement on what, if anything, courts can do when governments are acting slowly, haphazardly, foolishly, in bad faith, or not at all in fulfillment of these kinds of positive constitutional obligations. If a constitution guarantees a right to decent housing, for example, and the government has not made sufficient public housing stock available, what can courts offer a homeless person who seeks to challenge government policy or to obtain housing that the constitution appears to promise?

Traditionally, many legal thinkers have opposed the inclusion of SERs in bills of rights, arguing that constitutional rights must be enforceable in courts in order to be meaningful but that courts would stray too far from their legitimate role in a constitutional democracy if they adjudicated these kinds of rights.³ Their essential argument is that SERs are too vague, costly, and institutionally complex for the judiciary to implement. In order to enforce a housing guarantee in the face of government neglect, for example, courts might have to design housing programs, require money be spent to implement them, and perhaps even take over their administration. Thus, it is argued, courts cannot enforce SERs without usurping the role of the legislative and/or administrative

primarily concerned with domestic constitutional guarantees, which vary and do not mirror the international guarantees precisely. Here, I define social and economic rights roughly as rights against the government for the satisfaction of basic needs, including food, shelter, education, healthcare, and the like. Some authors refer to these as social welfare rights. *See, e.g.,* Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 *Tex. L. Rev.* 1895 (2004). Others simply call them welfare rights. *See, e.g.,* Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 *U. Pa. L. Rev.* 962 (1973). Avi-Ben Bassat and Momi Dahan provide the following definition of social rights: "A constitutional social right is . . . one that grants a personal entitlement to monetary transfers (including social insurance) or transfer in kind on a universal basis." Avi Ben-Bassat & Momi Dahan, *Social Rights in the Constitution and in Practice* (Hebrew U. of Jerusalem, Sch. of Pub. Policy Working Paper No. 05-03, May 2003), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=407260.

2. *See* Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 *U. Chi. L. Rev.* 519, 521 (1992) ("[T]he constitutions of . . . most . . . liberal democracies . . . contain[] . . . language establishing affirmative welfare rights or obligations.").

3. *See infra* notes 23–77 and accompanying text. Some might oppose the protection of SERs on ideological grounds. I leave these objections aside for the purposes of this essay and focus instead on the legitimacy and capacity concerns.

branches of government. In response, defenders of SERs have pointed out conceptual flaws in rigid distinctions between civil and political rights (CPRs) on the one hand and SERs on the other that place only the latter outside judicial reach.⁴

Yet even those who argue for a robust judicial role in the enforcement of SERs admit that their full implementation threatens to strain judicial capacities and push boundaries of judicial legitimacy.⁵ There is no single comprehensive theory of the judicial role in enforcement even among the SER-friendly. Those who favor adjudication of SERs agree that courts ought to share the task of defining and enforcing the rights with government and other actors, but there is little agreement on how.

Current prevailing approaches to SER enforcement work best where governments are willing to follow the judicial lead or where governments have already taken steps toward fulfilling their obligations. These prevailing approaches, however, leave courts facing a negligent or recalcitrant government with a choice between more aggressively setting out and enforcing the precise details of government obligations or backing away from enforcement. This dynamic limits the potential of courts to meaningfully guarantee SERs when judicial protection is most needed—where majoritarian politics neglect them. The result is haphazard enforcement that fails to protect vulnerable minorities against the majority's neglect. From the point of view of would-be rights claimants, haphazard judicial enforcement may be better than no enforcement at all. A more comprehensive jurisprudential method that does not give governments the power to avoid or frustrate adjudication would more consistently hold governments to their constitutional obligations.

Recently, some courts have turned to deferential modes of review and remedial approaches to enforce SERs.⁶ These approaches leave governments considerable flexibility in how they fulfill SERs, but still allow citizens to use the courts to force governments to demonstrate reasonable progress toward that end. A problem with these approaches is that they can be unstable: courts seeking to meaningfully enforce SERs may have difficulty maintaining a deferential stance where governments do not respond to their

4. See *infra* notes 78–91 and accompanying text.

5. See *infra* notes 91–94 and accompanying text.

6. See *infra* Parts II.B & III.

satisfaction.

It can be argued that the principal benefit of deferential styles of judicial review is that they require governments to account for choices that affect SER outcomes as part of their constitutional obligations. A focus on accountability can help to reconceive the role of courts and their relationship to political actors and civil society in a manner more hospitable to SER enforcement than traditional views of rights as trumps.⁷

The most developed and theorized accountability-centered approaches to constitutional rights realization have been called experimentalist.⁸ Experimentalist systems require participation of all stakeholders in defining goals and measuring SER achievement at a local level,⁹ and require political units to measure and share data about progress toward these goals and to adopt best practices of other units.¹⁰ Courts ensure that there is appropriate consultation, reporting, and adoption of best practices.¹¹ They may also contribute to the creation of experimentalist systems by suggesting that such governance systems meet SER obligations.

7. See generally Ronald Dworkin, *Rights as Trumps*, in Theories of Rights 153 (Jeremy Waldron ed., 1984) (arguing that rights should be understood as trumps over justifications for political decisions that focus on the goals of the community as a whole); Ronald Dworkin, *Taking Rights Seriously* 82–90, 131–49, 194 (1977).

8. See, e.g., Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum. L. Rev. 267 (1998) (advocating experimentalism in government that combines local flexibility with knowledge-sharing systems to create a form of local self-government that combines Madisonian decentralization with contemporary delegation to expert agencies); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 Harv. L. Rev. 1016 (2004) (defining “destabilization rights” as “rights to disentrench an institution that has systematically failed to meet its obligations and remained immune to traditional forces of political correction,” and arguing that civil rights suits have become experimentalist by emphasizing “stakeholder negotiation, continuously revised performance measures, and transparency”); James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Movement of School Governance and Legal Reform*, 28 N.Y.U. Rev. L. & Soc. Change 183 (2003) (describing a new mode of public school management emphasizing local independence in setting and measuring progress towards goals, extensive information sharing, and little direct judicial management).

9. Dorf & Sabel, *supra* note 8, at 314–23.

10. *Id.* at 341–56.

11. *Id.* at 388–404.

Experimentalist governance systems seem particularly well-suited to the protection of SERs. They may guard against stagnation by generating information and providing a process-based engine for change.¹² These governance systems require governments to demonstrate progress and to seriously consider input from stakeholders, including the poorest and least powerful members of society who are often neglected in majoritarian politics.¹³ As experimentalist approaches to constitutional rights realization consider rights to be constantly under development, they accommodate concerns about the indeterminacy of SERs.¹⁴ They also allow the content of rights to be developed through more direct democratic participation in addition to or instead of judicial exposition.¹⁵

The constitutional jurisprudence of several jurisdictions supports experimentalist, governance-based approaches to protecting SERs. This paper examines the enforcement of positive constitutional SERs in the United States, South Africa, and Canada. I suggest that judges supporting deliberative enforcement regimes, which focus on measuring the effects of SER policy, may be able to move beyond the democracy-versus-enforcement muddle that has stymied attempts to carve a meaningful, coherent role for courts in constitutional SER definition and protection. Where experimentalist systems work best, they can more fruitfully draw upon a polity's commitments to SER norms than either ordinary majoritarian politics or traditional judicial decision-making.

At the same time, because these approaches are procedural and somewhat hostile to judicial articulation of substantive norms, they do not provide answers about what judges should do if the systems fail to generate results that live up to judges' senses of what the constitution requires. Where experimentalism does not produce optimal SER outcomes, judges will face the familiar choice between declaring the system a failure and articulating their own vision of the content of SERs or withdrawing from the field due to institutional incapacity. Even in an optimally functioning experimentalist system, however, the level of popular commitment to SER norms will limit

12. *Id.* at 314–23.

13. *Id.*

14. *Id.* at 444–69.

15. *Id.*

their realization. Ultimately, it is this very constraint that might retain the legitimacy of judicial enforcement of SERs under a well-functioning experimentalist system.

This paper proceeds in six parts. Part I sets out the traditional concerns associated with the constitutional enforcement of SERs. Part II identifies and criticizes the dominant approaches to SER enforcement. It suggests that these approaches, in seeking to avoid drawing courts too far outside their proper sphere, are unlikely to contribute significantly to the systematic implementation of SERs, particularly when there is government resistance. Part III discusses and evaluates a shift toward judicially-mandated accountability as a remedy where courts reach the limits of their capacity to define and enforce SERs. Part IV introduces experimentalist approaches and suggests that they provide a promising method of ensuring that positive SER outcomes are achieved by shifting the judicial focus from the substantive content of rights to the procedures through which content is developed. Part V presents a case study of the potential of experimentalism for addressing constitutional rights related to health care in Canada. Finally, part VI discusses the limits of experimentalist approaches.

I. SOCIAL AND ECONOMIC RIGHTS AND THE PROBLEM OF JUSTICIABILITY

Other than political will,¹⁶ perhaps the biggest obstacles to ensuring the faithful, meaningful judicial enforcement of SERs are (1) their perceived cost, (2) the lack of agreed-upon standards for the meaning of SERs, and (3) the view that rights enforcement requires agreed-upon standards.¹⁷ Traditionally, many legal thinkers have opposed constitutionalizing SERs on the basis that constitutional rights must be enforced in courts in order to be meaningful and that

16. For an exhaustive discussion of the moral and philosophical case for the inclusion of SERs in a constitution, see Cécile Fabre, *Social Rights Under the Constitution* (2000).

17. Dilys Hill, *Rights and Their Realisation*, in *Economic, Social and Cultural Rights: Progress and Achievement* 1, 18–19 (Ralph Beddard & Dilys Hill eds., 1992); Julia Hausermann, *The Realisation and Implementation of Economic, Social and Cultural Rights*, in *Economic, Social And Cultural Rights: Progress And Achievement*, *id.* at 47, 63–72 (expressing the need to try new approaches outside traditional adjudication for enforcing SERs).

judicial articulation and enforcement would take courts too far outside their legitimate role in a constitutional democracy.¹⁸ This view has led some constitution drafters to omit SERs from bills of

18. See Cass R. Sunstein, *Against Positive Rights, in* Western Rights? Post-Communist Application 225, 225–29 (András Sajó ed., 1996) [hereinafter Sunstein, *Against Positive Rights*] (arguing that social and economic rights should not be included in constitutions of Eastern European countries shifting from communist to capitalist systems). *But see* Cass R. Sunstein, *The Second Bill of Rights* 228 (2004) [hereinafter *Second Bill of Rights*] (arguing that the South African Constitutional Court’s approach to social and economic rights “has provided the most convincing rebuttal yet to the claim that judicial protection [of SERs] could not possibly work in practice”). See also Joel Bakan, *What’s Wrong with Social Rights?*, in *Social Justice and the Constitution: Perspectives on a Social Union for Canada* 85, 86 (Joel Bakan & David Schneiderman eds., 1992) (arguing that entrenched SERs will not live up to their promise because they are “too vague to guarantee anything of substance, do not touch the complicated causes of poverty and disadvantage, and their symbolic message is at best ambiguous”); David Beatty, *The Last Generation: When Rights Lose Their Meaning*, in *Human Rights and Judicial Review: A Comparative Perspective* 321, 350 (David M. Beatty ed., 1994) (arguing that judicial enforceability of social and economic rights would give courts power to determine government priorities which would threaten the separation of powers); Frank B. Cross, *The Error of Positive Rights*, 48 *UCLA L. Rev.* 857, 880–93 (2001) (arguing that the recognition of positive rights to public assistance would be ineffective given the economic and political realities of judicial enforcement of rights); Wiktor Osiatynski, *Social and Economic Rights, in* Western Rights? Post-Communist Application 233, 233 (András Sajó ed., 1996) (arguing that “the more [SERs there are] in the constitution, the less enforceable [are] those rights” and that “the constitutionalization of social and economic rights does not result in their automatic protection”); D. M. Davis, *The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles*, 8 *S. Afr. J. Hum. Rts.* 475 (1992) (arguing that because SERs are judicially unmanageable, the new South African bill of rights should treat SERs as guiding principles for legislation and grounds for setting aside legislation that violate them); Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate Rights to Food, Water, Housing and Health?*, 98 *Am. J. Int’l L.* 462, 475 (2004) (arguing against the creation of an individual complaints mechanism for the implementation of the ICESCR on the ground that adjudication of SERs will not “contribute to a practical, useful resolution of the issue at hand, which relevant parties will, in turn, respect and implement”); E.W. Vierdag, *The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights*, 9 *Neth. Y.B. Int’l L.* 69, 73 (1978) (arguing that the term “right” should be reserved for those rights “that are capable of being enforced by their bearers in courts of law, or in a comparable manner”).

rights entirely,¹⁹ or to include them but declare that they cannot be judicially enforced.²⁰ Courts have also declined to read rights to education,²¹ medical services,²² housing,²³ and subsistence-level social assistance²⁴ into existing bills of rights owing, at least in part, to concerns about the justiciability of SERs.

There are no clear *a priori* criteria for determining justiciability. Definitions tend to sound circular: a question is justiciable when it is apt for judicial solution.²⁵ Whether a question is

19. See, e.g., Paul Hunt, *Reclaiming Social Rights* 43–53 (1996) (tracing concerns about judicial enforceability in the debate over whether to include second generation rights in the New Zealand Bill of Rights and the country's eventual decision to adopt an eighteenth-century style bill of rights containing mainly civil and political rights).

20. See, e.g., Ir. Const., 1937, art. 45 (“The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution.”); India Const. art. 37 (“The provisions contained in this Part shall not be enforced by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”).

21. See, e.g., *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 12 (1973) (“We have carefully considered each of the arguments supportive of the District Court’s finding that education is a fundamental right or liberty and have found those arguments unpersuasive.”).

22. See, e.g., *Harris v. McRae*, 448 U.S. 297, 318, n. 20 (1980) (holding there is no constitutional obligation to provide assistance to indigent women seeking medically necessary abortions).

23. See, e.g., *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (holding that there is no fundamental right to housing).

24. See, e.g., *Gosselin v. Quebec (A.G.)* [2002] 4 S.C.R. 421 (Can.) (“The question therefore is not whether s. 7 has ever been—or will ever be—recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards. I conclude that they do not.”); *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (stating famously, “the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court”).

25. Geoffrey Marshall, *Justiciability*, in *Oxford Essays in Jurisprudence* 265, 269 (A. Guest ed., 1961). See also Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 Harv. L. Rev. 1833, 1840 (2001) (“Justiciability doctrine at once describes the judicial practice and shapes that practice in light of normative concerns and institutional assumptions.”). But see Frank I. Michelman, *Democracy-Based Resistance to a Constitutional Right of Social Citizenship: A Comment on Forbath*, 69 Fordham L. Rev. 1893, 1895 (2000)

justiciable depends exactly on what courts in any given system are (or ought to be) willing to adjudicate.²⁶ As Scott and Macklem have observed,

Justiciability is a deceptive term because its legalistic tone can convey the impression that what is or is not justiciable inheres in the judicial function and is written in stone. In fact, the reverse is true: not only is justiciability variable from context to context, but its content varies over time. Justiciability is a contingent and fluid notion dependent on various assumptions concerning the role of the judiciary in a given place at a given time as well as on its changing character and evolving capability.²⁷

Although some constitutions do specify in positive terms which rights can be judicially enforced,²⁸ for the most part courts have themselves developed their own justiciability doctrines.²⁹ And indeed, many courts faced with claims relating to social welfare rights have found those rights to be outside judicial competence.³⁰

The essential argument against the justiciability of SERs is that they are vague, costly, and institutionally complex to implement.³¹ A court setting out the content of government obligations to provide food, housing, health care, education and the like³² would, it is feared, dictate how so much of the budget is spent

(stating that a right is justiciable when “the terms leave interpreters with little room for serious dispute about how to apply them”).

26. Dennis & Stewart, *supra* note 18, at 474–75 (arguing for a “more substantive” approach to justiciability that asks whether adjudication will “contribute to a practical, useful resolution of the issue at hand which the relevant parties will, in turn, respect and implement”).

27. Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 U. Pa. L. Rev. 1, 27 (1992).

28. See *supra* notes 19–24 and accompanying text.

29. For example, the doctrines of mootness, ripeness, standing, and political questions have been developed mainly through judicial decisions. See generally Richard H. Fallon, Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler’s The Federal Courts and the Federal System* 114–253 (5th ed. 1996); Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* 27–199 (1999).

30. See *supra* notes 21–24.

31. See *supra* note 8.

32. The view that SERs cannot be enforced in courts results, at least in part, from a perception that SERs impose positive obligations on governments to

that it would set vast tracts of social policy with neither popular legitimacy nor the necessary expertise and factual information for designing social institutions. In order to enforce a housing guarantee in the face of government neglect, for example, courts might have to design housing programs, require money to be spent to implement them, and perhaps even take over their administration. Thus, it is argued, courts cannot enforce SERs without usurping the role of the legislative and/or administrative branches of government.

In response, defenders of SERs have pointed out conceptual flaws in rigid distinctions between civil and political rights (CPRs) and SERs that place only the latter outside judicial reach.³³ The enforcement of CPRs can also have cost implications, require interpretation of constitutional text, or lead courts to require positive government action.³⁴

Yet even those who argue for a robust judicial role in the enforcement of SERs admit that their full implementation threatens to strain judicial capacities and push boundaries of the judicial role.³⁵ Although SER adjudication may not present challenges of a unique *nature*, it may give rise to familiar problems to a greater *degree*.³⁶

create programs in relation to housing, health care, education and the like. Although SER protection may not in all circumstances require positive government action (*see infra* notes 82 to 89 and accompanying text), I set out the arguments against constitutional rights assuming, as the critics do, that full realization of SERs often requires positive government action. *See* Scott & Macklem, *supra* note 27, at 45 (observing that “the strongest critics of social rights . . . have difficulty conceptualizing social rights as being anything but positive”).

33. Scott & Macklem, *supra* note 27; Victor Abramovich, *Courses of Action in Economic, Social and Cultural Rights: Instruments and Allies*, 2 Int. J. on Hum. Rts. 181, 186 (2005) (suggesting that SERs and CPRs can be analyzed within a continuum of negative and positive obligations).

34. Scott & Macklem, *supra* note 27, at 43; Abramovich, *supra* note 33, at 187.

35. *See, e.g.*, Scott & Macklem, *supra* note 27, at 43–45 (noting that some scholars “have argued that social rights should be treated as nonjusticiable . . . because the courts are perceived as institutionally incompetent institutions” that are better suited to “demarcate the limits of negative liberty”); Abramovich, *supra* note 33, at 193 (noting that the judiciary is ill-suited to determine public policy priorities, lacks the means to compel governments to provide new services, and could create new inequalities in *ad hoc* adjudication).

36. *See* Mauro Capelletti, *The Judicial Process in Comparative Perspective* 150 (1989) (“[I] am very skeptical about the possibility of drawing an abstract line to determine how far judicial review can legitimately go.”); Tushnet, *supra* note 1,

Even the strongest SER proponents acknowledge that new, potentially high economic costs, a lack of agreement over the content of SERs, and the institutional complexity that might be involved in remedying SER violations may present special challenges to the individual enforcement of positive, self-standing SERs. Frank Michelman, for example, suggests that courts should avoid cutting welfare rights “out of whole cloth of speculative moral theory . . . and foist[ing] them on recalcitrant legislatures.”³⁷ Nonetheless, proponents argue, once a society accepts that a constitutional system without a social rights guarantee is illegitimate, “political liberals are not free just to shuck the belief if it happens to become theoretically inconvenient.”³⁸ A government’s failure to meaningfully deliver SERs may raise as many legitimacy concerns as the judicial enforcement of these rights.

II. DOMINANT APPROACHES TO SER ENFORCEMENT

Three broad (and to some extent overlapping) approaches to conceiving of and enforcing constitutional SERs predominate in light of justiciability concerns. According to the first—nonjusticiability—SERs should be treated as norms by which all constitutional actors ought to guide their behavior, but should not form the sole basis of an individual constitutional challenge in court.³⁹ The second—case-by-case—suggests that individual enforcement of SERs need not place too great a strain on judicial capacities in every circumstance, and courts ought to implement SERs using traditional tools where concerns about judicial capacity and usurpation of the legislative role are attenuated.⁴⁰ Under a third, more recent approach, individuals can challenge government policies (or lack of policies) that affect SERs, but judicial review is deferential, allowing government

at 1897; *Schachter v. Canada*, [1992] 2 S.C.R. 679, 709 (Can.) (extending a legislative paternity benefit scheme to adoptive fathers and stating that although any court-ordered remedy will have budgetary repercussions, “[a] remedy which entails an intrusion into this sphere so substantial as to change the nature of the legislative scheme in question is clearly inappropriate”).

37. Michelman, *supra* note 1, at 1010.

38. Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 Int’l J. Const. L. 13, 32 (2003).

39. Frank Michelman, an early advocate of judicial enforcement of SERs, seems to adopt this view. *See supra* note 25.

40. *See infra* notes 44–74.

flexibility to design programs aimed at fulfilling SERs. According to this last model— administrative-style-review—⁴¹ courts set the broad bounds within which government can operate and interfere only when governments fail to act or where governments fail to show that policies are reasonably directed toward SER fulfillment.⁴² In this way, courts would leave the government both to develop the content of rights and to determine remedies for SER violations.

Neither of the first two approaches is sufficient to hold neglectful or recalcitrant governments to their SER obligations. The third approach appears more promising but has been justly criticized as unstable: in the event of government recalcitrance, courts might be tempted to intervene too much or shy away from the confrontation and intervene too little.⁴³ In this section, I set out each of these approaches and assess their potential for holding governments accountable for SER obligations.

A. Case-by-case Justiciability Assessment

Some SER proponents suggest that courts can and should adjudicate individual claims to SERs in some circumstances, without venturing further than their judicial role in enforcing traditional CPRs.⁴⁴ Instead of declaring particular kinds of rights to be *prima facie* non-justiciable, courts ought to gauge the extent to which adjudication of a particular case risks drawing courts outside their proper role. Where concerns around judicial capacity and legitimacy

41. See Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa* 13 (U. Chicago Public Law Working Paper No. 12; U. Chicago Law & Economics, Olin Working Paper No. 124), available at <http://ssrn.com/abstract=269657> (“What the South African Constitution [sic] Court has basically done is to adopt an *administrative law model of socio-economic rights.*”) (emphasis in original).

42. See *infra* Part II.B.

43. See Tushnet, *supra* note 1, at 1909–12 (finding that courts sometimes ratchet up substantive requirements, set benchmarks, and sometimes loosen requirements in response to new facts).

44. See, e.g., Scott & Macklem, *supra* note 27; David Wiseman, *The Charter and Poverty: Beyond Injusticiability*, 51 U. Toronto L. J. 425, 441 (2001) (arguing that distinctions between negative and positive rights are “ill-founded” and that the courts do not successfully account for the fundamental values underlying SER claims); Michelman, *supra* note 1; Abramovich, *supra* note 33, at 183–85 (arguing that the difference between SERs and CPRs is more one of degree than kind).

are sufficiently low, the claim should be justiciable.⁴⁵ A number of factors may be relevant to the justiciability of a particular claim.

For example, the constitutional text might specify clear and precise SER obligations, leaving little room for judicial interpretation or “policy-making”. Thus, the Supreme Court of Canada has enforced positive minority language education rights but has refused to read a right to basic subsistence⁴⁶ or health care⁴⁷ into Section 7 of the Canadian Charter of Rights and Freedoms. Its reluctance may be due to the extent of judicial interpretation required to find a right to health, or a right to welfare in the relatively imprecise guarantee of “security of the person.”⁴⁸

Similarly, enforcement might be less problematic where a constitutional text specifies few, but very precise SERs.⁴⁹ Aggressive judicial enforcement of the narrower category of Canadian minority language education rights would have a relatively low impact on government policies compared with a judicially-enforced right to health care or welfare.

The historical context of a guarantee might reduce uncertainty as to its meaning and purpose, attenuating concerns about judicial lawmaking. Courts in Canada and in South Africa have invoked the remedial purposes of constitutional housing guarantees and minority language education rights, respectively, as justifications for intervening in the face of government neglect.⁵⁰

45. See Wiseman, *supra* note 44, at 441, 448; Abramovich, *supra* note 33, at 192.

46. *Gosselin*, 4 S.C.R. 421 at para. 69.

47. *Chaoulli v. Quebec (A. G.)*, [2005] 1 S.C.R. 791 at para. 104 (Can.).

48. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, §7 (U.K.).

49. See also 1975 Syntagma [SYN] [Constitution] Art. 21(2), 22(1) (Greece) (“All persons have the right to be protected from the collection, processing, and use, especially by electronic means, of their personal data, as specified by law.”); Const. Art. 38(3) (Italy) (“Disabled and handicapped persons are entitled to education and vocational training.”).

50. Both the Canadian and the South African constitutions contain SERs aimed at remedying historical injustice. S. Afr. Const. 1996, Ch. II, §§ 26-27, see *infra* note 88 and accompanying text; see also Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, §23 (U.K.). Canada’s constitutional minority language education rights were designed to prevent the progressive erosion of official minority language groups in Canada, preserve their culture, and encourage their

Courts might also consider the extent to which legislation, prior judicial decisions, and society have elaborated the content of a right. Where governments have acted toward fulfillment of particular rights, courts might look at this activity as a legitimate democratic expression of the content of the right.⁵¹

In addition, where the protection of constitutional rights can be achieved without significantly realigning government priorities, the need for deference is diminished because the effect on competing priorities is lessened. Governments may have already committed

flourishing. *Mahe v. Alberta*, [1990] 1 S.C.R. 342, 363–64 (Can.); *Doucet-Boudreau v. Nova Scotia*, [2003] 3 S.C.R. 62 at paras. 26–27 (Can.). The housing guarantee in the South African constitution was designed to fix housing shortages caused by Apartheid-era laws and policies that left millions of blacks living in shantytowns. *South Africa v. Grootboom*, 2001 (1) SA 46 (CC) at para. 6 (S. Afr.). The Supreme Court of Canada urged caution in interpreting and applying minority language education rights that “place[] positive obligations on government to alter and develop major institutional structures.” But it continued: “[T]his does not mean that courts should not “breathe life” into the expressed purpose of the section, or avoid implementing the possibly novel remedies needed to achieve that purpose.” *Mahe*, [1990] 1 S.C.R. at 365. Similarly, the South African Constitutional Court has referred to the constitutional SER guarantees’ transformative purpose in support of its adjudication of SERs. *Grootboom*, 2001 (1) SA 46 at paras. 6, 25.

51. See Lawrence Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw. U. L. Rev. 410, 429 (1993) (“In some cases, the Court ought to be able to act on entitlements associated with minimum welfare once other institutions of government have acted and created contexts in which the issue of right surfaces largely unencumbered by other questions.”). In *United States v. Burns*, [2001] 1 S.C.R. 283, for example, the Supreme Court of Canada held that it is unconstitutional for Canada to extradite two men wanted for murder to a jurisdiction that might impose the death penalty unless assured that it would not. In support of its decision, which reversed two earlier Supreme Court rulings, the Court referred, *inter alia*, to Canada’s international advocacy against the death penalty and its domestic abolition of the death penalty as reflections of the fundamental Canadian view that the death penalty violates the right to liberty and security of the person. The court stated: “While government policy at any particular moment may or may not be consistent with principles of fundamental justice, the fact that successive governments and Parliaments over a period of almost 40 years have refused to inflict the death penalty reflects, we believe, a fundamental Canadian principle about the appropriate limits of the criminal justice system.” *Burns*, [2001] 1 S.C.R. 283 at para. 78. See also *Abramovich*, *supra* note 33, at 198 (describing the process by which a court “accepts a measure” created by the other branches of government, and then “transform[s] its character from a mere arbitrary decision into a constituted obligation”).

sufficient funds to fulfilling the right, allowing courts simply to take issue with the means.⁵² Government forbearance from rights-violating behavior might suffice to remedy the wrong under some circumstances.⁵³

Finally, courts should be mindful of the particular conception of separation of powers in the constitutional order in which they operate. Regarding the U.S. legal system, Helen Hershkoff suggests, for example, that the counter-majoritarian difficulty⁵⁴ that militates against expansive federal judicial intervention is attenuated in the state context where state judges are popularly elected and retained,⁵⁵ and where constitutional amendment is much easier.⁵⁶

Where, on the other hand, the content of a right is not clear from the constitutional text, prior judicial decisions, popular understandings, or legislation, and where enforcement threatens to have wide-ranging consequences on government allocative choices,

52. See, e.g., Charles Reich, *The New Property*, 73 Yale L.J. 733, 751–56 (1964) (outlining the procedural safeguards necessary for the fair administration of public benefits programs); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that constitutional due process in the context of terminating welfare benefits requires an evidentiary hearing prior to the deprivation).

53. See *infra* notes 55–59 and accompanying text.

54. See, e.g., Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 111, 128 (Yale University Press 1962) (1962) (describing how political democracy creates bounds within which the Court should exercise its powers); Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 Yale L.J. 1, 7–16 (1989) (discussing Bickel's theory of judicial review and judicial legitimacy as linked to popular consent).

55. Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 Harv. L. Rev. 1132, 1158 (1999) (“The fact of judicial election [subjects state judges] to a kind of popular veto that in theory sets a boundary or tether on judicial decisionmaking.”). See also Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 Rutgers L.J. 881, 900 (1989) (listing the reasons why states enjoy an “enhanced democratic pedigree,” including the fact that well over half of the nation's state judges are elected in some fashion).

56. Hershkoff, *supra* note 55, at 1170; Neil E. Komesar, *Imperfect Alternatives: Choosing Institutions, in Law, Economics, and Public Policy* 3, 12 (Timothy P. Ryan ed., 1994) (urging “comparative institutional analysis” that avoids reliance on “idealized institutional conceptions”); Martha Minow, *Making All the Difference: Inclusion, Exclusion and American Law* 362 (1990) (“Questions of separation of powers concern not so much whether one branch has invaded the prerogatives of another as whether the branches all remain able to participate in the process of mutually defining their boundaries.”).

courts using the case-by-case approach should be reluctant to intervene.

The case-by-case approach suffers from a few fundamental weaknesses, however. First, it may be difficult to determine when justiciability concerns are in fact sufficiently attenuated and thus, judicial implementation may appear haphazard. In addition, to the extent that courts treat legislation as partially fulfilling constitutional norms, case-by-case adjudication risks discouraging legislative experimentation. Perversely, courts have less ability to intervene when an SER has been neglected by other actors. This is at least arbitrary and possibly contrary to the purpose of constitutionalizing rights. Some examples illustrate these difficulties.

1. SERs as Negative Rights

The case-by-case approach underlies the assertion, common among SER proponents, that courts can enforce SERs that are negative rights.⁵⁷ Where SERs can be enforced by prohibiting, rather than requiring government conduct, there may be fewer concerns both about new government spending and about judicial capacity to design and implement social programs.⁵⁸ Many argue that this type

57. Some question the conceptual distinction between positive and negative rights. See Stephen Holmes & Cass R. Sunstein, *The Cost of Rights* 26 (1999) (contending that all rights require government enforcement and can therefore be seen as positive rights); Susan R. Bandes, *The Negative Constitution: A Critique*, 88 Mich. L. Rev. 2271, 2297–305 (1990) (arguing that as a practical matter, there is little difference today between a government penalty and a refusal to extend a subsidy); Amartya Sen, *Resources, Values and Development* 313 (1984) (noting that while there is a distinction between a “positive assertion” and a “negative assertion” of rights, “valuing negative freedom” itself “*must* have some positive implications”) (emphasis in original); Scott & Macklem, *supra* note 27, at 46 (arguing that the difference between positive and negative rights depends on one’s choice of baseline). Despite this difficulty in distinguishing negative rights from positive ones in the abstract, the positive/negative distinction has had practical significance, as courts have tended not to question the normative baseline. Thus, Sunstein questions the distinction between positive and negative rights, and yet continues to use it “for ease of exposition.” Sunstein, *Against Positive Rights*, *supra* note 18, at 225–26; see also Cross, *supra* note 18, at 864–68 (defending the distinction and setting out its importance in the American Bill of Rights).

58. The argument is that any right, whether traditionally considered to fall in the civil and political category or the social and economic category, can give rise to numerous kinds of obligations, some positive and some negative.

of judicial enforcement may not raise concerns about judicial legitimacy and competence.⁵⁹ For example, the Supreme Court of India has imposed a duty on the Bombay municipality not to evict pavement-dwellers without prior notice and without providing them with other sites for resettlement.⁶⁰

Concerns about judicial capacity and legitimacy may persist, however, even when rights are conceived as negative. For example, a court might not have the requisite facts or expertise to pass judgment on a government's attempt to decrease public dependence on state funds by choosing to scale back direct welfare payments in favor of a welfare-to-work program. This kind of difficult decision might lead a court using the case-by-case approach to refuse to give relief when the applicant seeks relief that would require far-reaching realignment of government priorities or practices even as it is willing to decide cases challenging a particular eviction. The result is that protection of SERs will appear haphazard. Judicial treatment of SERs as negative rights thus permits governments to avoid fulfilling them either by embedding the denial within government policy schemes or by failing to implement any programs at all.

Conceptualizing SERs as negative rights avoids the concern that courts will engage in large-scale realignment of government budgets. *See* Henry Shue, *Basic Rights: Subsistence, Affluence and Foreign Policy* 53 (2d. ed. 1996) (arguing for the recognition of subsistence rights generally and arguing that all basic rights have both positive and negative dimensions, referring to duties to respect, protect and fulfill); Hunt, *supra* note 19, at 32 (similar); Scott & Macklem, *supra* note 27, at 74 (similar); Asbjørn Eide, *Economic, Social and Cultural Rights as Human Rights*, in *Economic, Social and Cultural Rights: A Textbook* 9, 26 (Asbjørn Eide et al. eds., 2d ed. 2001) (giving a brief overview of the International Bill of Human Rights and later discussing the resources necessary to achieve the international human rights standard).

59. *See* Eide, *supra* note 58, at 25 ("Economic and social rights . . . can in many cases best be safeguarded through non-interference by the state with the freedom and use of resources possessed by the individuals.").

60. *Olga Tellis v. Bombay Municipal Corporation*, A.I.R. 1986 S.C. 180 (India). Although the Indian Constitution lists SERs as non-justiciable guiding principles, the Indian judiciary has read the right to life expansively. *See* *Bandhua Mukti Morcha v. Union of India*, A.I.R. 1984 S.C. 802 para. 55 (holding that Art. 32 of the Indian Constitution gives the Supreme Court the power to enforce fundamental rights in public interest litigation through "creative" rather than "passive" ways, assuming a "positive attitude in determining facts"); *Unni Krishnan v. State of Andhra Pradesh*, A.I.R. 1993 S.C. 2178 (reading Art. 21 of the Indian Constitution, protecting the right to "personal liberty," as inclusive of a child's right to free education until 14 years old).

2. Gap-filling

A court might also be able to impose some positive obligations with the case-by-case approach by, for example, filling in gaps in programs that governments have already substantially designed or where enforcement would be relatively inexpensive.⁶¹ In countries that already have relatively thick systems of social service provision, courts might be able to enforce SERs by policing arbitrary legislative or government decisions and distinctions in ways that do not either require massive public spending or significantly alter the government's chosen means for addressing basic needs. So for example, the New York Court of Appeals has interpreted the state's positive constitutional welfare right⁶² as prohibiting the legislature from "refusing to aid those it has classified as needy" by erecting procedural barriers to aid that have nothing to do with need.⁶³

Similarly, in *Gosselin v. Quebec* (Attorney General),⁶⁴ two dissenting Supreme Court of Canada Justices would have struck down a Quebec "workfare" law as a violation of the security of the person guarantee in Section 7 of the Canadian Charter of Rights and

61. This kind of "gap-filling" can be distinguished from judicial gap-filling in statutory cases. In the latter context, judges can be expected to rely, at least partly, on the intent of the legislature in interpreting a statute. See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 411 (1989) (describing the necessity of consulting "background principles" drawn from context and "legal culture" in order to interpret statutes); John F. Manning, *Legal Realism and the Canon's Revival*, 5 Green Bag 2d 283, 285 (2002) (citing Sunstein on the deficiencies of textualism and the interpretive problems inherent in consulting legislative intent to supplement those deficiencies). In the context of enforcing constitutional SERs, judges engaged in gap-filling might make decisions that are explicitly contrary to the intent of the legislature. See, e.g., notes 65–75 and accompanying text.

62. N.Y. Const. art. 17, § 1 ("The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means as the legislature may from time to time determine.").

63. *Tucker v. Toia*, 371 N.E. 2d 449, 452 (N.Y. 1977) (holding that the state cannot deny home relief to people under twenty-one years old who are classified as needy under the state's regulations, but who cannot provide court orders proving that their parents were not supporting them); see also *Minino v. Perales*, 589 N.E. 2d 385 (N.Y. 1992) (holding that the state cannot deny benefits to legal immigrants who are unable to produce information about their sponsor's income despite their best efforts).

64. *Gosselin*, 4 S.C.R. 429 (Can.).

Freedoms. The law reduced social assistance benefits for people under thirty who failed to participate in work or education programs. Justice Arbour, dissenting, found that Section 7 of the Charter could be read to impose positive obligations on the government to provide the basic means of subsistence⁶⁵ and that the state, by enacting a social assistance scheme, had engaged in sufficient state action to trigger these obligations.⁶⁶ Since the under-thirtys could not survive on their reduced benefits, according to Justice Arbour, their right to security of the person was violated.

Justice Arbour acknowledged that concerns about justiciability were valid. Nonetheless, she held, the Court could legitimately and competently acknowledge the right without stepping outside its proper role.⁶⁷ The only truly non-justiciable question in her view was setting out precisely “what is required, or how much expenditure is needed, in order to safeguard the right.”⁶⁸ But because the Quebec Legislature had already set out a basic level of welfare designed to meet the ordinary needs of a single adult, she concluded the court was relieved of this responsibility.⁶⁹ It could simply require that the government provide this amount for everyone. The welfare right under Section 7 would not be unlike that of the New York state

65. The majority held that § 7 of the Canadian Charter of Rights and Freedoms might one day be interpreted to place positive obligations on the government to guarantee adequate living standards, but that the case at bar did not provide sufficient evidence to support such an interpretation of § 7. Justice McLachlin stated:

I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances. However, this is not such a case. The impugned program contained compensatory ‘workfare’ provisions and the evidence of actual hardship is wanting. The frail platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support.

Id. at para. 82.

66. *Id.* at para. 326.

67. *Id.* at para. 330.

68. *Id.* at para. 331. Justice Arbour’s reasoning is consistent with the view of Canadian constitutional scholar David Beatty. Arguing against the judicial protection of subjective, individual social and economic rights, he has stated: “[C]ourts have consistently and without exception held that claims . . . which ask [the courts] to establish basic levels of economic and cultural well-being beyond those fixed by the elected representatives of the people are ‘non-justiciable.’” Beatty, *supra* note 18, at 348.

69. *Gosselin*, 4 S.C.R. 429 at para. 334.

welfare right, under which a court could prohibit exclusions from welfare so long as it did not set the precise amount of payment required.⁷⁰

Justice Arbour's justification is not entirely convincing here, in part because she addresses only one aspect of the justiciability difficulties. The non-justiciability argument asserts that the legislature is better suited not only to determine what "basic" needs are and what level of social assistance is required to meet them, but also to balance the right to subsistence-level services against other government priorities. In addition, the government ought to be able to choose the means by which it will safeguard the right: through direct payment, or by maintaining economic, social, political, or legislative conditions in which citizens might themselves be able to secure fulfillment of the right. Justice Arbour does not fully account for these concerns. Chief Justice McLachlin, writing for the majority, noted that the claimant did not give an explanation for the low participation rates of men and women aged under thirty in the workfare and education programs.⁷¹ Unlike Justice Arbour, she seemed reluctant to blame the government.⁷² Support for interest-balancing by the government might explain why the Chief Justice concluded that the facts in *Gosselin* were insufficient to support an expansive reading of Section 7 of the Charter.⁷³

The varying opinions in *Gosselin* show that judges might differ widely as to when justiciability concerns are sufficiently attenuated to allow for legitimate judicial intervention. Even if such concerns were not an issue, Justice Arbour's approach reveals the most important flaw of the case-by-case approach: it leaves government with the power to defeat justiciability. Had the Quebec government decided to reduce social assistance benefits to all, for example, or had the government not indicated a basic subsistence-

70. *Tucker*, 371 N.E.2d at 452.

71. *Gosselin*, 4 S.C.R. 456 at para. 8.

72. *Id.* at paras. 8, 83.

73. New York's highest court considered a similar issue in *Barie v. Lavine*, in which the plaintiff challenged regulations suspending certain welfare benefits to people who refused to accept workfare assignments. The court upheld the regulation, deferring to legislative choices about who is needy. *Barie v. Lavine* 357 N.E.2d 349, 352 (N.Y. 1976) ("The Legislature may in its discretion deny aid to employable persons who may properly be deemed not to be needy when they have wrongfully refused an opportunity for employment.").

level amount, Justice Arbour might have found the claim to be non-justiciable.⁷⁴ Once again, it is precisely when the government has not acted toward fulfilling SERs that judicial prodding is most needed, and where the judicial hands are tied under the case-by-case approach.

3. Minimum Core Content

Justiciability concerns are lessened if courts enforce only a minimum core content of rights, such as that required for basic subsistence. At the international level, the CESCR has recognized that the progressive implementation of SERs might make it difficult to detect violations. Its response has been to suggest that states can competently enforce a

minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.⁷⁵

Courts enforcing only a minimum core content presumably would have less say in how government resources were spent than if they could direct the full implementation of SERs, which guarantee, for example “an adequate standard of living . . . including adequate food, clothing and housing and . . . the continuous improvement of living conditions[.]”⁷⁶ as well as the “highest attainable standard of

74. *Gosselin*, 4. S.C.R. 429 at para. 331 (asserting that the amount of aid determined by the state to meet one’s basic needs would be non-justiciable); thus, Justice L’Heureux-Dubé qualified her concurrence with Justice Arbour on this point: “However, although governments should in general make policy implementation choices, other actors may aid in determining whether social programs are necessary. In the present case, the government stated what it considered to be a minimal level of assistance but a claimant can also establish with adequate evidence what a minimal level of assistance would be.” *Id.* at para. 142.

75. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ. Soc. And Cultural Rts., *Report on the Fifth Session*, Annex III, para. 10, U.N. Doc. E/1991/23, E/C.12/1990/8 (1991) [hereinafter General Comment 3].

76. ICESCR, *supra* note 1, art. 11.

physical and mental health.”⁷⁷

The minimum core content approach limits the threat that judicially-ordered SER fulfillment imposes on democratic decision-making to the extent that it simply curtails the rights’ potential reach. There may also be less variability in views of what constitutes subsistence-level fulfillment. Even if this minimum core content could be reliably determined,⁷⁸ the greater a state’s obligations, the greater the risk that judges will undermine democratic choices while enforcing compliance. Moreover, this approach does not help courts determine the most appropriate means for fulfilling SERs. Thus, the South African Constitutional Court has rejected the minimum core content approach to the adjudication of constitutional SER provisions, stating:

[I]n dealing with such matters the courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards called for. . . should be, nor for deciding how public revenues should most effectively be spent. There are many pressing demands on the public purse.⁷⁹

4. Assessment of the Case-by-case Approach

Defenders of the case-by-case approach hope that even if courts adjudicate only when competent to do so, judicial enforcement will reinforce the importance of these rights, leading governments to

77. *Id.* art. 12.8.

78. Some commentators have suggested that even the core content varies depending on the resources available to a state because states can justify their failure to protect the minimum core. In describing the nature of states parties’ obligations under the ICESCR, the CESCR explained that art. 2(1) of the ICESCR obliges a state to take the necessary steps toward fulfillment of SERs “to the maximum of its available resources.” General Comment 3, *supra* note 75. A state that fails to meet any minimum core obligation has the burden of proving that it has made “every effort” to satisfy the minimum obligations. General Comment 3, *supra* note 75. Eide observes, then, that “[t]he immediate obligations of states under Article 2 imply that countries with more resources have a higher level of core content or immediate duties than those with more limited resources.” Eide, *supra* note 58, at 27.

79. *Minister of Health v. Treatment Action Campaign (No. 2)*, 2002 (5) SA 721 (CC) at 740 (S. Afr.) [hereinafter “TAC”].

give them greater priority.⁸⁰ Patchy enforcement, by tweaking existing systems or prohibiting government interference with existing rights, may be better than no enforcement at all. Given the SER enforcement paradox—people cannot participate in a democracy if their basic needs are not met, but judicial enforcement of SERs threatens democracy by taking social policy-making out of the hands of the people—perhaps only imperfect protection can be expected.

However, the case-by-case approach is weakest in the situations that most warrant judicial intervention: where governments have done little or nothing to fulfill particular rights.⁸¹ This approach largely deflects, rather than addresses, the enforcement question. If a polity constitutionalizes SERs, either because they are of fundamental value in and of themselves or for instrumental reasons, the government should not be able to avoid its responsibilities by choosing not to act.

B. The Administrative Review Model

An emerging set of solutions to the problem of judicial enforcement of SERs looks not to the *circumstances* of judicial intervention, but rather to its *forms* by calling for deferential review of government policies and actions that affect SERs. Its proponents suggest that even where justiciability concerns are great, courts can participate in the enforcement of SERs in ways that are less threatening to democratic values. They gesture toward creative approaches designed to ensure cooperation among branches of government in defining the content of positive SERs and in enforcing them where courts cannot or should not act alone.⁸² These

80. See, e.g., Hershkoff, *supra* note 55, at 1156 (asserting that social and economic goals, as elaborated in constitutions, compel governments to act to achieve these goals, and that the justiciability of these goals is an integral part of that process); see also Martin Scheinin, *Economic and Social Rights as Legal Rights*, in *Economic, Social and Cultural Rights*, *supra* note 58, at 54 (suggesting that recognizing the justiciability of social rights will lead states to understand them as legally binding and requiring positive obligations). *But see* Dennis & Stewart, *supra* note 20 (criticizing the “build it and they will come” approach to creating a binding adjudicative method for enforcing SERs).

81. See Abramovich, *supra* note 33, at 193. (“[I]n an extreme case . . . when the state completely and absolutely fails to fulfill all of its positive obligations, it would be extremely difficult to compel direct fulfillment through judicial action.”).

82. See, e.g., Hershkoff, *supra* note 55, at 1156 (“By committing the state to

approaches do not necessarily see courts defining and ordering full, immediate individual realization of a given right. Instead, they tend toward blending of legislative-judicial functions⁸³ and are designed to promote legislative-judicial cooperation.⁸⁴

A model commonly advanced in recent years in academic works⁸⁵ and judicial decisions across wide-ranging constitutional

explicit public goals, state constitutions compel state legislatures to enact policies that carry out these goals . . . [SERs] are no longer merely aspirational goals of political justice; they are . . . part of the constitutional fabric and a nondiscretionary feature of the legal order.”); *see also* Scheinin, *supra* note 80, at 30 (“[In this paper] the applicability and ‘justiciability’ of social and economic rights is discussed in terms of an interplay between international and domestic actors. This discussion is based on existing institutionalized practices capable of clarifying the interpretation of treaty provisions. Without such practices, the applicability and justiciability would be, by many a lawyer, regarded as vague and, thus, unsuitable for application in concrete cases.”).

83. *See* Scott & Macklem, *supra* note 27, at 41–42 (“Interpreting constitutional guarantees as requiring positive governmental action, and invoking the constitution to prod the state into better protecting the necessities of life for members of society, would involve some blending of the judicial and legislative functions.”).

84. *Id.*; *see also* Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 Wash. U. L.Q. 659, 684–85 (1979) (stating that the duty to fulfill unmet human needs “seems to be one that the courts acting alone cannot or ought not undertake to define, impose and enforce”); Abramovich, *supra* note 33, at 197, 203 (arguing that the judiciary should not formulate public policy but instead have a “procedural focus” that directs judicial review toward “guarantee[ing] the conditions that make it possible to adopt deliberative processes for producing legislative directives or administrative acts”).

85. *See* Johan Vande Lanotte and Tom De Paelsmaeker, *Economic, Social and Cultural Rights in the Belgian Constitution*, in *Social, Economic and Cultural Rights: An Appraisal of Current European and International Developments* 263, 273 (Peter Ven der Auweraert et al. eds., 2002) (“Some authors have already pointed out that the fear of the Judiciary supervising the political bodies and adjudicating socio-economic rights can be reduced by guaranteeing a margin of discretion to the public authorities. The Judiciary will only intervene if and to the extent that the limits of this margin of discretion are transgressed.”); Fabre, *supra* note 16, at 148 (same); Sandra Liebenberg, *The Protection of Social and Economic Rights in Domestic Legal Systems*, in *Economic, Social and Cultural Rights: A Textbook*, *supra* note 58, at 55, 67 (same); Helen Hershkoff, *Welfare Devolution and State Constitutions*, 67 Fordham L. Rev. 1901, 1913–26 (1999) (arguing that a court interpreting Article XVII of the New York State Constitution, N.Y. Const. Art. XVII, § 1, should “not itself construct welfare policy but [should] impose a burden on the legislature to show that the chosen ‘manner’ and ‘means’ are likely to carry forward the specified constitutional aim”).

systems sees courts setting out the broad bounds of the right in question, leaving governments a margin of appreciation within which to achieve that right. This model suggests an administrative-law style of review whereby government actions that are not, in a court's view, reasonably directed toward fulfillment of the constitutional right in question can be found unconstitutional.

This emerging model, reflected most famously in the South African Constitutional Court's jurisprudence, but also in Canadian minority language education rights jurisprudence,⁸⁶ has been hailed as the most promising approach for judicial protection of positive SERs.⁸⁷ Its advantages are clear: (1) the legislature, under some judicial pressure, sets its own obligations, and (2) courts are relieved of the task of setting complex, detailed policies and weighing competing budgetary claims, but judicial review is not excluded entirely. Governments are held to account, in court, for decisions where ordinary political processes might not have required such accounting. In this way, ineffective and sub-optimal policies can be brought to light. Social and economic rights holders who may lack power in the political arena are given an additional way to be heard and to bring political pressure. At the same time, because courts do not themselves set the precise terms of compliance, the usual governmental and popular institutions formulate policy.

As with the case-by-case approach, however, a closer examination reveals that many of the usual concerns associated with adjudication of SERs may persist within the administrative-review style model. These difficulties are evident in the South African experience. The South African Constitution contains numerous positive social and economic rights, including rights to access to housing, health care, food, water, and social security.⁸⁸ It qualifies the

86. See *infra* notes 128–148 and accompanying text.

87. See, e.g., Sunstein *supra* note 21, at 229 (“By requiring reasonable programs, with respect for limited budgets, the [South African Constitutional] court has found a way of assessing claims of constitutional violations without requiring more than existing resources will allow. In so doing the court has provided the most convincing rebuttal yet to the claim that judicial protection of [social and economic rights] could not possibly work in practice.”).

88. S. Afr. Const. 1996, Ch. II, §§ 26–27. Section 7(2) requires the state to “respect, protect, promote and fulfill the rights in the Bill of Rights,” including its social and economic rights provisions, making clear that the constitution imposes positive obligations on government. In certifying the constitution, the Constitutional Court explicitly considered separation of powers concerns and held

state's corresponding duty for each: "the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."⁸⁹

Courts interpreting the South African Constitution's SER provisions have used some elements of the case-by-case approach,⁹⁰ but for positive, substantive dimensions of the South African progressive SER guarantees, the Court employs the administrative review approach. Qualified guarantees protected under the administrative review approach do not provide positive, individual, free-standing rights to health care, housing, and the like, but rather allow the courts to review, deferentially in principle, whether governments are acting reasonably toward fulfilling the constitutional right in question. The government largely determines the content of constitutionally required provisions, subject to review by the courts. The "rather restrained and focused role for the courts" is thus to "require the state to take measures to meet its constitutional obligations and to subject the reasonableness of those measures to evaluation."⁹¹

In *Soobramoney v. Minister of Health (KwaZulu-Natal)*,⁹² in which the South African Constitutional Court upheld the state's refusal to provide dialysis treatment to a claimant with chronic renal failure as reasonable, the claimant needed dialysis in order to live and could no longer afford to pay for it privately. In light of budgetary constraints, people suffering from acute renal failure and

that the constitution's socio-economic rights are nonetheless "at least to some extent, justiciable." Ex Parte Chairperson of the Constitutional Assembly, 1996 (4) SA 744 (1996) (10) BCLR 1243 (CC) at para. 78 (S. Afr.). Its reasons for so finding included the familiar assertion that "many of the civil and political rights entrenched . . . will give rise to similar budgetary implications without compromising their justiciability." *Id.* At the same time, the court qualified its assertion of justiciability, stating that at "the very minimum, socio-economic rights can be protected negatively from improper invasion." *Id.* The court here seemed to be endorsing the case-by-case approach.

89. S. Afr. Const. 1996, Ch. II §§ 26(2), 27(2).

90. See *supra* note 50 and accompanying text.

91. See, e.g., *TAC*, 2002 (5) SA 721 at para. 70 (partly basing its analysis on fact that "this case concerns particularly those who cannot afford to pay for medical services [and that] [t]o the extent that government limits the supply of Nevirapine to its research sites, it is the poor outside . . . these sites who will suffer").

92. *Soobramoney v. Minister of Health (KwaZulu-Natal)*, 1997 (12) BCLR 1696, 1998 (1) SA 765 (CC) (S. Afr.).

those on waiting lists for kidney transplants were prioritized over those who, like the claimant, had chronic renal failure and were deemed medically unsuitable for transplants.⁹³ The majority held that given competing demands on resources, the government policy of prioritizing people suffering from acute renal failure and those on waiting lists for kidney transplants over those with chronic renal failure was reasonable, stating, “[a] court will be slow to interfere with rational decisions taken in good faith by political organs and medical authorities whose responsibility it is to deal with such matters.”⁹⁴

However, in the *Grootboom* case,⁹⁵ the government’s policy was found not to be reasonable; this is where the difficulties associated with administrative review approach become evident. The plaintiffs in *Grootboom* were some 900 poor people living in intolerable conditions on a football field, who were on the list for low-cost housing but had no real prospect of obtaining housing in the near future. Although the Cape Metropolitan Council, the supervisory tier of local government, had created a program to provide housing for those in desperate need, the program had not yet been implemented.

The Constitutional Court set out in broad strokes the content of the government’s obligation to those who cannot afford to pay for housing themselves, holding that a housing program had to (1) be in place; (2) be comprehensive, coherent, and coordinated;⁹⁶ (3) be balanced and flexible and make appropriate provisions for short-, medium-, and long-term needs;⁹⁷ (4) be reasonably conceived and implemented;⁹⁸ and (5) be continuously reviewed to account for changing social conditions.⁹⁹ The most substantive requirement, and the one on which the decision ultimately hinged, was that programs should take into account degree of need and extent of denial of the rights they aim to realize. In other words, those whose needs are most urgent must not be ignored.¹⁰⁰ Applying this standard, the

93. *Id.* at para. 2.

94. *Id.* at para. 29.

95. *Grootboom*, 2001 (1) SA 46 at paras. 48–51.

96. *Id.* at paras. 39–41.

97. *Id.* at para. 43.

98. *Id.* at paras. 40–44.

99. *Id.* at para. 43.

100. *Id.* at para. 44.

Grootboom Court found that the state housing program failed the reasonableness test because it made no provision for temporary relief for those in desperate need. It held that “[a] program that excludes a significant segment of society cannot be said to be reasonable.”¹⁰¹

Though it found a constitutional violation, the Court declined to give the respondents relief in the form of temporary housing so as not to offer the litigants preferential treatment over others similarly situated.¹⁰² Instead, it issued a declaratory order¹⁰³ requiring the state to meet the obligation to devise, fund, implement, and supervise measures to provide relief to those in desperate need, such as, but not limited to, those contemplated by the Cape Metropolitan Council’s program. The Court added that the Human Rights Commission, which was an amicus in the case and is constitutionally required to monitor and assess compliance with human rights in South Africa, would monitor and if necessary report on the efforts made by the state to comply with it the *Grootboom* judgment. This reporting requirement seems to simply repeat and draw attention to the Human Rights Commission’s usual mandate.¹⁰⁴

One difficulty with the administrative review approach is that the government may not respond with adequate programs, and parties may be unwilling or unable to bear the costs of re-litigation. Indeed, although the *Grootboom* case has been hailed as a great

101. *Id.* at para. 43.

102. *Id.* at para. 80. It did, however, approve a settlement agreement between the parties. Con. Ct. Order 38/00 (Sept. 21, 2000), available at <http://www.constitutionalcourt.org.za/Archimages/2874.PDF>.

103. Declaratory orders are becoming increasingly common in Canada and South Africa. See Kent Roach, *Remedial Consensus and Dialogue Under The Charter: General Declarations and Delayed Declarations of Invalidity*, 35 U. Brit. Colum. L. R. 21, 218 (2002) (describing the Canadian trend toward staying declarations of statutory invalidity to give governments the opportunity to modify the legislation to comply with the Constitution). See also *London Clubs International (Overseas) Investments (Pty.), Ltd. v. The Free State Gambling and Racing Board*, 1 SCA at 23 (noting that legislation has partially abrogated the common law rule against declarations without consequent relief); S. Afr. Const. 1996, § 38 (Courts “may grant appropriate relief, including a declaration of rights” in cases in which they find a Bill of Rights violation). *But see* President of the Republic of South Africa and Another v. Modderklip Boerdery (Pty.), Ltd., 2005 (8) BCLR 786 at para. 26 (holding that the State must “take reasonable steps to ensure effective relief for landowners faced with mass invasions of their property” and that a declaratory order did not constitute effective relief).

104. S. Afr. Const. 1996, §§ 184 (1) (c), 184 (2) (a), § 184 (3).

victory for SERs,¹⁰⁵ there has been some dissatisfaction with the government's response.¹⁰⁶ Until the post-litigation program is brought before the court for review once again, it is impossible to know whether it is a legally sufficient response to the needs of the most desperate.

The potential for inadequate responses exists whenever courts use general declarations to review remedial governmental action instead of more precise injunctive relief. As Kent Roach has observed in the Canadian context, "some dissatisfaction by Charter applicants with the eventual governmental response to the court's decision may ultimately be the price that is paid for a democratic and dialogic approach to remedies."¹⁰⁷ Nonetheless, Roach suggests that courts should "pay special attention to such signs of dissatisfaction with the ultimate results of general declarations,"¹⁰⁸ and should consider less deferential remedies in some circumstances.¹⁰⁹

This brings us to the next difficulty with the administrative-review style model: courts may not stay faithful to a deferential standard of review. In *Treatment Action Campaign (TAC)*,¹¹⁰ for example, the South African Constitutional Court purported to use the administrative review approach to rule that government restrictions on the use of Nevirapine (NVP), a drug used to combat mother-to-child HIV transmission, violated the constitution's right of access to health care. The drug had been approved by the relevant state body for use to reduce the risk of mother-to-child HIV transmission, and its manufacturers had offered to make the drug available free to the South African government for five years. However, the government decided to offer the drug only in certain pilot sites such that doctors outside those pilot sites were unable to prescribe the drug to their patients.¹¹¹ A group of civil society members, led by the Treatment Action Campaign, challenged the

105. See *supra* note 41.

106. See Kasmieni Pillay, *Implementing Grootboom*, 3(1) ESR Review 16 (2002), available at <http://www.communitylawcentre.org.za/Projects/Socio-Economic-Rights/esr-review/esr-previous-editions/esr-review-vol-3-no-1-july-2002.pdf>.

107. Roach, *supra* note 103, at 226–27.

108. *Id.*

109. *Id.* at 227.

110. *TAC*, 2002 (5) SA 721.

111. *Id.* at para. 19.

policy.

This time, the level of judicial review seemed to be far more searching and the intervention much stronger than in *Grootboom*.¹¹² The court rejected the government's justifications for the restriction. One government justification was that the benefits of NVP would be counteracted by HIV transmission through breastfeeding and that mothers would therefore require breast milk substitutes and counseling bearing in mind cultural factors and the lack of available clean water for mixing formula. The government also raised concerns about safety risks and the potential of developing resistance to the drug.¹¹³ The court's corresponding order was also more precise than it had been in *Grootboom*. It ordered the government to remove restrictions on NVP availability and to develop a comprehensive plan to prevent mother-to-child HIV transmission. Here, the court defined the right of access to health care more specifically than it did the right to housing in *Grootboom*.

So, how do we account for the Court's more searching inquiry under the reasonableness standard of review in *TAC*? One answer is that justiciability concerns were attenuated in this case. The claim had many hallmarks of a negative rights claim. The prohibition on distributing NVP was the underlying issue. However value-laden, this issue was not polycentric under the circumstances. The drug was available free of charge. Moreover, the government had provided additional funds for HIV treatment, including efforts to reduce mother to child transmission, during the lifetime of the case. By the time the court rendered its decision, the government had already gone some way toward incorporating NVP in its health policy by offering it at pilot sites,¹¹⁴ making it easier for the court to determine that its inclusion was feasible.¹¹⁵ Finally, the Court did not lack the

112. Tushnet, *supra* note 1, at 1908 ("The Constitutional Court's examination of the government's justifications for restricting the drug's availability was quite searching, and nothing in the relevant sections of the opinions indicates that the Court was giving any real deference to the government's judgments."). Similarly, Sunstein, who is sympathetic to the South African Constitutional Court's approach, states that the *TAC* court "rejected a policy judgment that seemed, on its face, to have at least some logical foundation." Sunstein, *Second Bill of Rights*, *supra* note 18, at 226.

113. *TAC*, 2002 (5) SA 721 at paras. 51–54.

114. *Id.* at para. 118.

115. *Id.* at para. 119

facts it needed to rule. The Government had already made the necessary legislative findings in formulating its HIV policies.¹¹⁶ Also, the medical information was relatively straightforward in the case. Thus, the court might have found it easier to weigh the risks and benefits of NVP than the relative merits of different ways of providing housing to the poor.

In addition, the Court may have undertaken a more searching inquiry because the *TAC* litigants posed a more concrete question than those in *Grootboom*.¹¹⁷ Where litigants seek review of the details of policy, even a court that endeavors to remain faithful to a deferential standard of review may be more likely to detect irrationalities. In other words, *TAC* may not represent a change in standard of review. Rather, the case shows that given enough data, courts will detect irrationalities in legislative schemes and act upon them even while applying a deferential standard of review.

An alternative explanation for the court's more aggressive intervention may be political. Sunstein observes:

This decision must be understood in the context of the South African's palpably inadequate response to the HIV crisis—a response bred partly by the irresponsible denial, among high-level officials, that HIV is responsible for AIDS at all. In these circumstances, it made sense for the court to do something other than rubber-stamp the government's failure to make a life-saving medicine available to young children.¹¹⁸

116. *Id.* at para. 4.

117. The Constitutional Court summarized the claim in *TAC* as: "The programme imposes restrictions on the availability of Nevirapine in the public health sector The applicants contended that these restrictions are unreasonable when measured against the Constitution." 2002 [5] SA at para. 11. On the other hand, the applicants' claim in *Grootboom*, that an order for a municipality's provision of temporary accommodation was improper, involved the question of "how to enforce [socio-economic rights] in a given case." 2001 (1) SA at para. 20. *See also* Applicant's Notice of Application for Leave to Appeal, Minister of Health v. Treatment Action Campaign, 2002 (5) SA 721 (CC) (S. Afr.) (listing various grounds of error that entail the unreasonableness of the government's program); Applicant's Notice of Application for Leave to Appeal, Gov't of the Rep. of South Afr. v. Grootboom, 2001 (1) SA 46 (CC) (S. Afr.) (listing various grounds of error that entail justiciability issues).

118. *Supra* note 41, at 228; Victor Abramovich likewise observes: An analysis of the historical circumstances that led up to a greater judicial activism concerning economic, social and

Thus, where (a) political factors lend greater legitimacy to judicial intervention; the (b) court has enough information to support its decision; (c) implementation will not be costly or require the creation of new institutions; or (d) litigants ask precise questions, there is a risk that a court may substitute its own judgment for that of the legislature. Instead of merely setting out the broad goals of the right, it might review the details of how the government goes about fulfilling those rights.

There may be nothing wrong with the shift to more aggressive judicial review of policy details from the point of view of those concerned with ensuring that SERs are justiciable, so long as legislatures willingly accept the court's invitation for collaboration. There may be a promising dialogic model here. When justiciability concerns are high, the courts may prompt action by requiring a reasonable program and thus redirecting government attention in constitutionally-required directions. When governments return with programs, justiciability concerns drop as judges can merely react to policy instead of creating it, ensuring that careful attention has been paid to designing programs reasonably. The more detail the government provides about the content of the right, the more information a court will have in which to detect irrationalities, and the more closely it might be drawn into the details of the policy.¹¹⁹

Nonetheless, if more detail provokes heightened standards of judicial review, government flexibility is jeopardized. Once a court has given the constitutional seal of approval to a particular substantive way of achieving entrenched rights, a government seeking to steer clear of constitutional challenges may be reluctant to try improving upon the judicially-approved standard or policy, particularly where positive results are not assured.¹²⁰

cultural rights in Latin America is directly related to the existence of political factors that assigned the Judiciary a special legitimacy to occupy a place in the decision-making arena that was previously restricted to other branches of the state.

Supra note 33, at 196.

119. See *supra* note 51 and accompanying text.

120. The concern about the seeming finality of judicial enforcement motivated Justice Black to dissent in *Goldberg v. Kelly*, 397 U.S. at 271-79, in which the majority held that due process guarantees welfare recipients a hearing before termination of welfare benefits. Justice Black stated that because "the

More serious consequences might follow where governments fail to respond appropriately to declarations or are not progressing at a rate that the court considers appropriate. Tushnet invokes the example of the American school desegregation cases, in which the circuit courts began by giving schools latitude in determining how to go about desegregation.¹²¹ The result was that school desegregation did not proceed. The U.S. Supreme Court responded by authorizing lower courts to set out detailed desegregation plans and closely supervise their implementation.¹²² The South African court has not ruled out more aggressive judicial intervention.¹²³

Alternatively, instead of progressively detailed intervention, a court faced with a recalcitrant government might simply tolerate the latter's lack of action, electing neither to set the right out in greater detail nor to issue correspondingly precise injunctions. The same concerns that underlie the view that SERs are not justiciable

operation of a welfare state is a new experiment for our Nation[.]" the court should avoid having "new experiments in carrying out a welfare program . . . frozen into our constitutional structure." *Id.*; Hershkoff, *supra* note 55, at 1162.

121. Tushnet, *supra* note 1, at 1916; *see also* Lino A. Graglia, Disaster by Decree: The Supreme Court Decisions on Race and the Schools 38–39 (1976) (describing circuit court decisions that essentially allowed school desegregation to continue). In Canada and South Africa, courts have tended to dismiss this concern. *See e.g.*, *Doucet-Boudreau*, [2003] 3 S.C.R. 62 at paras. 27–8 ("Fortunately, Canada has had a remarkable history of compliance with court decisions by private parties and by all institutions of government. . . . This tradition of compliance takes on a particular significance in the constitutional law context, where courts must ensure that government behaviour conforms with constitutional norms but in doing so must also be sensitive to the separation of functions among the legislative, judicial and executive branches."); *TAC*, 2002 (5) SA 721 at para. 129 ("The government has always respected and executed the orders of this Court. There is no reason to believe that it will not do so in this case.").

122. Tushnet, *supra* note 1, at 1917; *see infra* notes 181–183 and accompanying text.

123. In *Grootboom*, the court indicated that it might have been willing to enforce a minimum core content of SERs without any deference to legislatures had the content of the rights been better fleshed out, as they were at the international level. *Grootboom*, 2001 (1) SA 46 at para. 65 ("The [CESCR] developed the concept of minimum core over many years of examining reports by reporting states. This Court does not have comparable information."). In *TAC*, the court stated that so long as government complied with its decisions, the court would decline to use the more aggressive measure of retention of jurisdiction, but did not rule out retention of jurisdiction in the future. *TAC*, 2002 (5) SA 721 at para. 129.

might motivate a court in that position to refuse to proceed further. It might back off subtly, for example, by narrowing doctrinal bases of intervention, declare that further elaboration of the right and more aggressive enforcement measures would take courts outside the proper judicial role, or it might, as Pamela Karlan put it, “declare victory”, claiming that the problem is solved when it is not.¹²⁴

Thus, the administrative review approach is potentially unstable.¹²⁵ A government’s failure to act may provoke judicial micromanagement (which the administrative review model was designed to avoid) or withdrawal (which effectively renders the rights non-justiciable). In essence, the administrative review approach risks the same objections made of the direct enforcement of SERs.

Tushnet notes that the potential for instability may be outweighed by the benefits of forcing a government to justify its policy choices in terms of its effects on SERs.¹²⁶ Where governments respond to judicial decisions reasonably and courts are satisfied, both will have succeeded in jointly defining the content of the right and enforcing it. Even unheeded declarations may represent a form of dialogue by tapping into a polity’s understanding of the content of SERs. As Tushnet states:

Judges should interpret resistance to the implementation of strong substantive rights as civil society’s mobilization in support of a conception of rights alternative to the one the judges have offered. Further, judges should also come to see that mobilization is itself a way of enforcing what civil society understands social welfare rights to be.¹²⁷

If the administrative review model’s principal benefit is promoting accountability by encouraging civil society to articulate its own conception of the content of SERs regardless of whether judicial decisions are followed, it may make sense for courts to target accountability and encourage societal articulation of norms directly. Courts enforcing SERs have imposed accountability requirements as an alternative to dictating precise detailed contents of constitutional rights when faced with recalcitrant governments.

124. Pamela Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch out of the Political Thicket*, 82 B.U. L. Rev. 667, 667–68, 677 (2002).

125. Tushnet, *supra* note 1, at 1897, 1912.

126. *Id.* at 1910–11.

127. *Id.* at 1918.

III. ACCOUNTABILITY IN COURT

Methods of judicial review that are more directly targeted to requiring accountability are more procedurally focused. Instead of issuing precise orders and forcing legislatures to disobey the courts in order to communicate a different view of the content of SERs, courts could require a government to provide more information and account for progress toward constitutional goals as part of its constitutional duty. This is a useful alternative for judges who wish to avoid the choice between micromanagement and withdrawal.

The example of Canadian minority language education rights, which have been protected mainly through declarations of rights consistent with the administrative review approach, may be instructive here. The only SER explicitly provided for in Canada's Constitution is a minority language education right. Section 23 of the Canadian Charter of Rights and Freedoms gives parents who are members of the English-speaking minority in Quebec or the French-speaking minority in other English-speaking-majority provinces the right to have their children receive primary and secondary education in their mother tongue.¹²⁸

Courts have not denied the justiciability of Section 23¹²⁹ but have preferred to set the broad content of the rights rather than the details, and have generally favored declaratory over injunctive relief to avoid overstepping the judicial role. This preference reflects, in Roach's view, an "antipathy among many Canadian judges toward American-style detailed orders or structural injunctions to remedy unconstitutional conditions in schools, prisons and other institutions."¹³⁰ In addition, the remedial choice has been based, like the South African one, on an "assumption that governments would act in good faith to implement the relevant constitutional entitlements and that governments, not the courts, were in the best position to decide precisely what steps should be taken to comply with the Charter."¹³¹ So long as governments did not show an unwillingness to comply with declarations, the Supreme Court of

128. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, §23 (U.K.).

129. *Mahe*, [1990] 1 S.C.R. at 366.

130. Roach, *supra* note 107, at 211.

131. *Id.*; see also *supra* note 211 and accompanying text.

Canada continued to issue general declarations of the broad content of the right¹³² to avoid “unduly fetter[ing] the discretion of the province to choose the ‘modalities’ by which to provide for the management and control of [minority] language education.”¹³³

Of course, legislatures have not always proceeded to the satisfaction of the courts. Where governments have dragged their heels, some lower courts have issued injunctive relief.¹³⁴ These injunctions are viewed as an exceptional remedy in Canadian constitutional law¹³⁵ and have never been explicitly endorsed by the Supreme Court of Canada.¹³⁶

In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*,¹³⁷

132. See, e.g., *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 S.C.R. 3 at paras. 32-34 (Can.) (recognizing that “[t]he province has the duty to actively promote educational services in the minority language and to assist in determining potential demand” and favoring a “sliding scale” approach to the demand for French instruction that accords deference to the government’s measured demand).

133. Reference Re Public Schools Act, [1993] 1 S.C.R. 839, 864 (Can.).

134. See, e.g., *Marchand v. Simcoe (County) Board of Education*, [1986] 29 D.L.R. (4th) 596, 619 (Ont. Sup. Ct.) (granting an injunction to implement French language instruction because the legislature had failed to provide it within four years after the right had ripened); *Lavoie v. Nova Scotia (Attorney-General)*, [1988], 47 D.L.R. (4th) 586 (N.S. Sup. Ct.) (similarly issuing an injunction for the design of a French language instruction program); *Conseil des Écoles Séparées Catholiques Romaines de Dufferin et Peel v. Ontario (Ministre de l’Éducation et de la Formation)*, [1996] 136 D.L.R. (4th) 704 (Ont. Ct. Gen. Div.), aff’d [1996] 30 O.R. (3d) 681 (Ont. Ct. App.) (issuing an injunction that removed administrative obstacles to the construction of a French-language school); *Conseil Scolaire Fransaskois de Zenon Park v. Saskatchewan*, [1999] 3 W.W.R. 743 (Sask. Q.B.), aff’d [1999] 12 W.W.R. 742 (Sask. Ct. App.) (ordering an English school board to share facilities and assets with a French school board); *Assoc. Française des Conseils Scolaires de l’Ontario v. Ontario*, [1988] 66 O.R. (2d) 599 (Ont. Ct. App.) (granting preliminary relief for certain changes to laws affecting distribution of French language trustees in the school boards); *Ass’n des parents francophones de la Colombie-Britannique v. British Columbia*, [1998] 167 D.L.R. (4th) 534 (B.C. Sup. Ct.) (issuing a declaration that legislation must accommodate a mechanism to resolve disputes between French language parents and a majority English language school board).

135. Roach, *supra* note 107, at 217 (noting “a distinct preference for general declarations as opposed to detailed injunctions as a means of enforcing section 23 of the *Charter*.”).

136. The cases in note 134 were cited with approval in *Doucet-Boudreau*, [2003] 3 S.C.R. 62 at para. 29, though their content was not discussed at length.

137. *Doucet-Boudreau v. Nova Scotia*, [2000] 575 A.P.R. 246 (Q.L.).

where a provincial government was slow to build constitutionally-required French-language schools, a trial judge took a tack novel to Canadian constitutional doctrine. He decided that no further clarification of the content of Section 23 was necessary; the government understood its obligation to build schools from previous Charter jurisprudence. Another declaration would add very little. The problem was that the government was failing to accord due priority to its Section 23 duties, citing budgetary concerns and lack of consensus in the community around the details of construction.¹³⁸ The government would subvert the very purpose of the right, the preservation of Francophone culture, through additional delay because progressive assimilation would leave fewer and fewer French-speaking students.¹³⁹ Assimilation would also defeat the application of the right because governments are only required to build minority-language schools when there are a sufficient number of prospective students.¹⁴⁰ The court had thus reached the point where, under the administrative review model, it might be forced to consider issuing more precise injunctions. But instead of issuing such an order, enforceable only by contempt actions if the government failed to comply once again, the trial judge directed the government to use its “best efforts” to build schools and design programs by more or less specific deadlines and retained supervisory jurisdiction to hear reports on the government’s progress.¹⁴¹ The trial judge’s order in this case was designed to prompt quick government action by requiring ongoing accountability *without* requiring fresh litigation and descending into details of how the right ought to be implemented, which might draw a court out of its usual role and into that of the legislature or the executive.

The Supreme Court of Canada approved the retention of jurisdiction by a 5-4 majority.¹⁴² The essence of the remedy approved in *Doucet-Boudreau* is that the court, while remaining within justiciability limitations, sets the goal to be achieved and requires

138. *Id.* at para. 204.

139. *Id.* at para. 210.

140. *See Mahe*, [1990] 1 S.C.R. at 345-6, 366 (Can.) (setting out the factors relevant to determining when the “numbers warrant” minority language education facilities, including “the number of persons who will eventually take advantage of the contemplated program or facility.”).

141. *Doucet-Boudreau*, [2000] 575 A.P.R. at 297.

142. *Doucet-Boudreau*, [2003] 3 S.C.R. 62 at paras. 60–88.

the government to set its own shorter-term targets, justify them, and explain its progress toward them under the court's eye and as part of its constitutional obligation.¹⁴³ In this sense, the remedy makes public accountability for the achievement of rights part of the government's constitutional obligations. Insofar as the remedy reflects the right, public accountability becomes a part of the definition of the SER.

While the majority in *Doucet-Boudreau* went no further than approving the trial judge's retention of jurisdiction to *hear reports*, it did not preclude judges from retaining jurisdiction to *issue further orders* in the future. The court issued guidelines for what kinds of constitutional remedies are available, stating that an appropriate and just remedy is one that

- (a) "meaningfully vindicates the rights and freedoms of the claimants";
- (b) "employs means that are legitimate within the framework of our constitutional democracy";
- (c) judicially "vindicates the right while invoking the function and powers of a court";
- (d) is "fair to the party against whom the order is made";
- and (e) "remain[s] flexible and responsive to the needs of a given case."¹⁴⁴

If in-court reporting alone did not achieve the desired goals, courts would be allowed to retain jurisdiction to issue further orders superintending the government's choice of means to implement the court's declaration.¹⁴⁵ Governments are most likely to respond to

143. *Id.*

144. *Id.* at paras. 55–59.

145. Indeed, Kent Roach, *supra* note 107, at 266–67, writing about *Doucet-Boudreau* before the Supreme Court of Canada issued its judgment, extolled the virtues of the trial judge's retention of jurisdiction assuming that it did include the power to issue further orders, stating:

Retention of jurisdiction by the trial judge after the general declaration would allow the implications of the general declaration to be fleshed out in a less confrontational manner than a contempt motion or fresh second round litigation [R]etention of jurisdiction by the trial judge would allow governments the opportunity and the flexibility to develop the precise means to implement the court's declaration. At the same time... [s]uccessful *Charter* litigants will not be forced to commence fresh litigation should they not be satisfied with the manner in which the government responds to and interprets the general declaration or uses any court-approved period of delay. *A motion to a trial judge already familiar with the facts*

retention of jurisdiction to hear reports (and not to issue further orders), in cases like *Doucet-Boudreau*, when the constitutional end is sufficiently clear and uncontested, and where the court can foresee a relatively short timeline for full achievement of the right. Canadian minority language education rights are not progressive: where the numbers warrant, governments are required to build and maintain schools. The parties in *Doucet-Boudreau* agreed on this relatively clear constitutional end. At issue was merely the timeline for construction; there was no dispute (yet) about the quality of the schools or facilities. Retention of jurisdiction would end once schools were built.

Where the content of the right is constantly under development and where there is no clear end goal in sight, it will make less sense for a court to retain jurisdiction to hear reports. Courts cannot retain jurisdiction indefinitely. This might explain the South African Constitutional Court's reluctance, up to this point,¹⁴⁶ to grant structural relief in SER litigation. Rather than retain jurisdiction to supervise the implementation of the case, the Constitutional Court in *Grootboom* instead indicated (however redundantly) that the Human Rights Commission was to monitor compliance with its judgment instead of the court.¹⁴⁷ Indeed, the Human Rights Commission has been dissatisfied continually with the government's implementation of *Grootboom*. If the courts were to retain jurisdiction in cases like *Grootboom*, as some commentators have argued they should,¹⁴⁸ and as some high courts enforcing SERs in South Africa have done,¹⁴⁹ when does the retention of jurisdiction

provides a relatively accessible vehicle for which the successful Charter applicant to question the government's response to a [declaration].

(emphasis added).

146. Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v. City of Johannesburg and Others, Case No. CCT 24/07, pending before the South African Constitutional Court at the time of this publication, raises the issue of whether it is appropriate for a lower court to issue a limited supervisory order requiring the City of Johannesburg to register a compliance affidavit within four months of the order. The case concerns the eviction of poor people from allegedly unsafe buildings in Johannesburg and thus implicates the government's compliance with *Grootboom*.

147. See also TAC, 2002 (5) SA 721 at paras. 96–103.

148. See Pillay, *supra* note 106, at 18.

149. See, e.g., the High Court orders in *Grootboom v. Oostenberg Municipality and Others*, 2000 (3) BCLR 277 (CC) at paras. 293H–294C; TAC &

end? Further, if retention of jurisdiction comes to include the power to issue further orders—a likely development if the government’s progress is unsatisfactory—then the risk of judicial micromanagement continues.

A requirement that the government report on its progress in court makes sense where there is legislative-judicial consensus on ends, a relatively short timeline for their achievement, and where the court wants to leave the government with discretion as to means. Where the ends are themselves unclear or contested, such as where the content of rights is expected to change over time, retention of jurisdiction is a less practicable means of ensuring that governments do not neglect positive constitutional obligations.

IV. NEW GOVERNANCE AND ACCOUNTABILITY BEYOND THE COURTROOM: BRINGING THE ADMINISTRATIVE REVIEW MODEL HOME

Facing recalcitrant governments but worried about their own institutional competence, some courts have approved legislative schemes that promote stakeholder driven accountability and empirically measurable accountability. Such schemes can be seen in the enforcement of American state constitutional rights to education.¹⁵⁰ In this part, I argue that such process-oriented or “new governance” approaches, the most heavily theorized of which have been called “experimentalist,”¹⁵¹ provide promising insights into how courts can hold governments to account for progress toward fulfilling SERs both through and beyond the litigation context.

Few consider the United States a source of models for the judicial enforcement of SERs. Aside from a brief period when the US Supreme Court was willing to enforce procedural guarantees in support of social and economic rights,¹⁵² US federal courts have generally been hostile to the notion of positive constitutional rights. The US Supreme Court has affirmed the Constitution as a charter of

Others v. Minister of Health and Others, 2002 (4) BCLR 356, 386–87; City of Cape Town v. Rudolph and Others, 2002 (11) BCLR (CC) 1236, 1280–81; S v. Z and 23 Similar Cases, 2004 (4) BCLR 410; E, N, and Others v. Government of RSA and Others, 2007 (1) BCLR 84.

150. Liebman & Sabel, *supra* note 8.

151. Dorf & Sabel, *supra* note 8.

152. See, e.g., *Goldberg*, 397 U.S. 254 (1970).

negative liberties.¹⁵³ At the same time, the American experience with detailed command-and-control injunctive relief in constitutional institutional reform litigation in areas like schools, mental health institutions, prisons, police, and housing has been heavily criticized both domestically and internationally.¹⁵⁴ The worried tones adopted by the Nova Scotia Court of Appeals in *Doucet-Boudreau*¹⁵⁵ and the reluctance of the South African court to order structural relief in *TAC*¹⁵⁶ reflect the desire of courts seeking deferential, co-operative methods of protecting SERs to avoid the ostensible perils of the American structural injunction. Correspondingly, the pervasiveness of the command-and-control structural injunction as the remedy of choice where American social institutions fail to meet constitutional standards may in part explain judges' reluctance to recognize positive constitutional obligations.

But in recent years, state courts have begun to enforce state constitutional rights to an adequate public education,¹⁵⁷ marking

153. *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 204 (1989) (“The Court’s baseline is the absence of positive rights in the Constitution and a concomitant suspicion of any claim that seems to depend on such rights.”).

154. *See, e.g.*, Ross Sandler and David Schoenbrod, *Democracy by Decree: What Happens When Courts Run Government* 139 (2003) (arguing that structural injunctions “[go] beyond the proper business of courts” and “often render[] government less capable of responding to the legitimate desires of the public” as well as making politicians “less accountable”); Beverley McLachlin, *The Charter: A New Role for the Judiciary*, 29 *Alta. L. Rev.* 540, 553–55 (1990) (assessing how Canadian courts should handle new responsibilities placed upon them by the Charter).

155. *Doucet-Boudreau v. Nova Scotia (Attorney General)*, [2001] NSCA 104, paras. 43–48 (“I am loathe to open the door, even slightly, to American jurisprudence on the enforcement of mandatory injunctions. The experience in the United States, of ‘hands on’ judicial intervention into the administrative and legislative branches of government, has found little favour in this country. In a pre-Charter address to the Law Society of Upper Canada, 1981, Justice Estey, then of the Supreme Court of Canada, referring to this American jurisprudence, said that it ‘leaves lawyers breathless.’ He said further: ‘This line of remedy is wholly foreign to us, so far, and I would suggest that no amount of prodding by our law schools, professors, and commentators will bring this kind of litigation through the doors of our court-rooms.’”).

156. *TAC*, 2002 (5) SA 721 at para. 129 (indicating that structural injunctions should not be made unless necessary); *id.* at para. 113 (arguing that “due regard must be paid to the roles of the legislature and the executive in a democracy” in deciding whether to grant structural relief).

157. Nearly every state constitution contains some provision guaranteeing

American courts' first significant experience in enforcing positive constitutional SERs.

And over the years, courts employing injunctive relief in institutional reform litigation¹⁵⁸ have, at least on some accounts and in some instances, moved away from command-and-control structural relief to more deferential remedial approaches that seek to attenuate capacity and legitimacy concerns. Some of these approaches require ongoing monitoring of substantive progress beyond the litigation, not by courts, (as under the Canadian *Doucet-Boudreau* approach) nor a by a human rights commission (as in *Grootboom*), but instead by stakeholders through a legislatively-designed system that measures progress toward ever-evolving outcomes.

A. Experimentalism in Theory

Experimentalist¹⁵⁹ approaches are part of a constellation of so-called "new governance" methods¹⁶⁰ originally advocated in

public education. Formulations vary, but education clauses in state constitutions almost always impose positive obligations on governments. Most require the establishment or maintenance of public schools. Qualitative standards like "general and uniform," "general and efficient," "uniform," "adequate," "efficient," "high quality," and "thorough and efficient" are often set out. The Mississippi state Constitution is the only one not to contain a positive education clause. In the last 15 years or so, after over 100 years of state courts essentially ignoring education adequacy clauses, courts have begun to apply them with some success. The New Jersey Supreme Court was the first to attempt to define and enforce the right to an adequate education in *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973), *cert. denied, sub nom*; *Dickey v. Robinson*, 414 U.S. 973 (1973). Washington and West Virginia followed suit in *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978) and *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979). The vast majority of successful challenges to state education systems have been founded in whole or in part on the adequacy clauses. Michael A. Rebell, *Adequacy Litigation: A New Path to Equity?*, 141 PLI/NY 211, 222 (2004).

158. Without coming to firm definitions, Susan Sturm notes that the terms institutional reform litigation, public law litigation, and structural reform litigation are often used to refer to "a class of cases involving public institutions and policies, such as school desegregation, prison and mental hospital conditions, environmental management, housing discrimination, and electoral reapportionment." Susan Sturm, *A Normative Theory of Public Law Remedies*, 79 *Geo. L. J.* 1355, 1357 (1991) (cataloguing different ways in which judicial remedial practice has adapted from the traditional adversarial model to accommodate the competency and legitimacy concerns in public law litigation).

159. The term was originally proposed in Dorf & Sabel, *supra* note 8.

160. See Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise*

industrial and managerial context,¹⁶¹ and since applied to fields including government regulation of social problems.¹⁶² “New governance” approaches to regulation share a number of features. Instead of a top-down, hierarchical rule-based system where failures to adhere are sanctioned, or unregulated market-based approaches, the new governance school posits a more participatory and collaborative model of regulation in which multiple stakeholders, including, depending on the context, government, civil society, business and nonprofit organizations, collaborate to achieve a common purpose. In order to encourage flexibility and innovation, “new governance” approaches favor more process-oriented policy strategies like disclosure requirements, benchmarking and standard-setting, audited self-regulation,¹⁶³ and the threat of imposition of default regulatory regimes to be applied where there is a lack of good-faith effort at achieving desired goals.¹⁶⁴ “New governance” has

of Governance in Contemporary Legal Thought, 89 Minn. L. Rev. 342 (2004) (chronicling and setting out the essential features of the new governance model).

161. See, e.g., William H. Simon, *Toyota Jurisprudence*, in *New Governance and Constitutionalism in Europe and the U.S.* (Gráinne de Burca & Joanne Scott eds., 2005) (The “jurisprudential implications” of the Toyota Production System “seem to underlie . . . important recent public law developments, especially in health and safety regulation and the delivery of public services”); Michael Piore & Charles F. Sabel, *The Second Industrial Divide* (1984); see also Christopher L. Erickson & Sanford M. Jacoby, *The Effect of Employer Networks on Workplace Innovation and Training*, 56 *Indus. & Lab. L. Rev.* 203 (2003).

162. See generally Jody Freeman, *Collaborative Governance in the Administrative State*, 45 *UCLA L. Rev.* 1 (1997) (discussing collaborative governance in health, safety, and environmental regulations); Jody Freeman, *The Private Role in Public Governance*, 75 *N.Y.U. L. Rev.* 543 (2000) (discussing the role of private actors in traditional spheres of public governance such as health care delivery and prison management); Bradley C. Karkainen, *Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 *Colum. L. Rev.* 903, 908 (2002) (advocating an overhaul of the National Environmental Policy Act through an “environmental management systems-oriented approach”); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 *Colum. L. Rev.* 458 (2001) (proposing a “structural regulatory solution” to the problem of second generation employment discrimination).

163. Freeman, *Collaborative Governance*, *supra* note 162, at 22–33.

164. The default regulatory regime has been called the “penalty default,” and can be defined as a regulatory solution imposed in the event that parties fail to reach satisfactory agreement. The regime is generally suboptimal for all parties and so operates to encourage parties to reach agreement. See Cristie L.

been proposed as fruitful for reconceiving, *inter alia*, constitutionalism,¹⁶⁵ individual constitutional rights,¹⁶⁶ and institutional reform litigation.¹⁶⁷

Michael Dorf and Charles Sabel present an exhaustive theoretical account of how individual constitutional rights would be protected under a new governance approach which they call democratic experimentalism.¹⁶⁸ Democratic experimentalism, in the new governance tradition, requires an institutional structure in which multiple units pursue social policy ends in parallel with one another.¹⁶⁹ The experimentalist program requires each local unit to generate data about its progress toward goals that the localities set in consultation with one another.¹⁷⁰ With the information so generated, citizens can “participate directly in determining and assessing the utility of the services local government provides, given the possibility of comparing the performance of their jurisdiction to the performance of similar settings.”¹⁷¹ A requirement that units adopt the best practices, it is hoped, will generate a race to the top. “In this way,” the authors explain, “experimentalism provides ever

Ford, *Toward a New Model for Securities Law Enforcement*, 57 *Admin. L. Rev.* 757, 825 (2005); Bradley C. Karkkainen, *Adaptive Ecosystem Management and Regulatory Penalty Defaults: Toward a Bounded Pragmatism*, 87 *Minn. L. Rev.* 943, 965–83 (2003); Bradley C. Karkkainen, *Information-Forcing Environmental Regulation: Penalty Defaults, Destabilization Rights, and Environmental Governance*, in *New Governance and Constitutionalism in Europe and the U.S.*, *supra* note 161.

165. See, e.g., Joanne Scott & David. Trubek, *Mind the Gap: Law and New Approaches to Governance in the EU*, 8 *Eur. L. J.* 1, 1–18 (2002) (discussing how new approaches to governance are affecting the classical “community method” of governance); Dorf & Sabel, *supra* note 8.

166. Dorf & Sabel, *id.*

167. Sabel & Simon, *supra* note 8.

168. Dorf & Sabel, *supra* note 8.

169. In this sense, Dorf and Sabel do not advocate that the judiciary require democratic experimentalism as a remedy. Rather, in their vision, the institutional structures of democratic experimentalism would be adopted by democratic means, but would in the result create a special role for courts. *Id.* at 419–20.

170. Dorf & Sabel, *supra* note 8, at 286–87 (“To establish initial product designs and production methods, firms turn to *benchmarking*: an exacting survey of current or promising products and processes which identifies those products and processes superior to those the company presently uses, yet are within its capacity to emulate and eventually surpass.”).

171. *Id.* at 288.

more rigorous benchmarks, and rights . . . are rolling too.”¹⁷²

A court in an experimentalist system thus does not come up with once-and-for-all solutions to threats against individual rights.¹⁷³ Instead, courts superintend an experimentalist procedure by detecting potential threats to constitutional values, and by assessing whether the state is engaging in the appropriate *deliberative* process.¹⁷⁴ Where entities engage in the required consultative and deliberative processes, generate enough data on the effectiveness of their chosen mechanisms to make rolling best-practice standards possible, and adopt the best practices of other localities or justify deviations, courts will defer to these choices. The idea is that the experimentalist system itself provides citizens in individual jurisdictions with information to hold their own institutions to account so courts do not have to get involved in substance.¹⁷⁵ At the stage of constitutional litigation, the challenge is to distinguish bona fide and successful experiments from sham and unsuccessful ones.¹⁷⁶ With due regard for the fact that some experiments may take longer to prove successful or unsuccessful than others, a reviewing court should verify whether all local units are engaging in the required consultation and careful consideration of best practices.¹⁷⁷ Where local entities fail to engage in the experimentalist project, a court can impose a “penalty default”—its own benchmark or minimum—using whatever evidence is available to it in the litigation or, where possible, with reference to those generated from other localities’ experiments. Entities would be required to adopt that so-called prophylactic rule¹⁷⁸ unless and until they participated in the experimentalist search for a superior articulation and implementation of constitutional rights. Thus, judicial review is procedural in the sense that it “asks what entities, jurisdictions, and

172. *Id.* at 464.

173. *Id.* at 395.

174. *Id.* at 390.

175. *Id.* at 288.

176. *Id.* at 464.

177. *Id.* at 389.

178. Dorf and Sabel provide the following unique definition of a “prophylactic rule”: “The court adopts a prophylactic rule when it identifies circumstances that threaten constitutional values, without necessarily being able to specify the causal chain by which the threat will eventuate, and where, accordingly, it may both fix general preventive measures and invite other actors, with better knowledge of the specifics, to improve on them.” *Id.* at 453.

agencies did to look for solutions, rather than whether the solutions were the right ones.”¹⁷⁹

The important addition that these kinds of schemes make to the administrative review approach is that, once in place, they relieve courts (and other agencies) from having to decide precisely what, for example, an adequate education consists of without abandoning enforcement to political discretion. The idea is that maximum consultation, systematic information-generation, and required adoption of best practices will generate a “race to the top,” so that the court need only superintend the process and not the substance.

The approach holds particular appeal for the elaboration and enforcement of SERs. The experimentalist vision sees all constitutional rights as suffering from the same infirmities that are generally alleged against SERs, namely that they lack precision, constantly evolve, and that their judicial enforcement may undermine democratic choices.¹⁸⁰ The allegation that SERs are less precise than CPRs and therefore less susceptible to “objective” determination loses its teeth under a system where the meaning of all rights is constantly determined and re-determined through the participation of relevant actors. Because superintending courts do not try to define the substance of a right but merely ensure that actors have engaged in an inclusive, bona fide effort to do so, concerns about judicial usurpation of legislative and executive roles are alleviated. An experimentalist system avoids problematic judicial supervision of the progressive implementation of rights by governments with a rolling best practices requirement.

B. Experimentalism in Practice: The Example of U.S. State Constitutional Education Clauses

State courts have been faced with the anticipated SER-related hurdles in enforcing constitutional education clauses. Some judges have responded to the difficulty of defining the content of constitutional rights and fashioning appropriate remedies by deferring to political branches or interpreting the enforcement of education clauses as exclusively a matter of legislative discretion. In

179. *Id.* at 397.

180. *Id.* at 451–52.

other words, they have treated state educational adequacy clauses as non-justiciable.¹⁸¹ Others have begun by setting out the broad content of the rights and then moving toward more precise injunctive relief, not unlike the trajectory followed after *Brown v. Board of Education*.¹⁸² Still others have supported experimentalist structures in an effort to enforce rights while avoiding the remedial difficulties that followed *Brown*.¹⁸³ After finding that chronically faltering school systems did not pass constitutional muster and after setting out the broad bounds of the right to an adequate education in a manner consistent with the administrative review approach, they endorsed statutory accountability schemes rather than dictating the details of the rights themselves.

Some commentators credit growing popularity of standards-based accountability regimes (the most well-known example being the federal No Child Left Behind Act) for some courts' successful moves towards enforcing the right to an adequate education.¹⁸⁴ These accountability regimes focus on educational outcomes. They call for standards, both for student achievement and school performance in generating student achievement, in the major subject areas. Michael Rebell explains:

In theory, once the content standards have been

181. Ex parte James v. Alabama Coalition for Equity, 836 So.2d 813, 819 (Ala. 2002) [hereinafter James II] (“[W]e now recognize that any specific remedy that the judiciary could impose would, in order to be effective, necessarily involve a usurpation of that power entrusted exclusively to the Legislature. Accordingly . . . we complete our judicially prudent retreat from this province of the legislative branch in order that we may remain obedient to the command of the people of the State of Alabama that we ‘never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men.’ Ala. Const. 1901, § 43 (emphasis added).”); see also Committee for Educational Rights v. Edgar, 672 N.E.2d 1178, 1193 (Ill., 1996) (“We conclude that the question of whether the educational institutions and services in Illinois are “high quality” is outside the sphere of the judicial function.”).

182. See Owen M. Fiss, *The Civil Rights Injunction* 6 (1978) (arguing for the increased use of injunctive remedies in civil rights cases).

183. See Liebman and Sabel, *supra* note 8 (attributing the retreat from *Brown v. Board of Education* to difficulties posed by the vagueness of the right and the aggressiveness of the remedy).

184. Rebell, *supra* note 157, at 231 (“It is not a coincidence that the implementation of standards-based reforms and the accelerating plaintiff successes in the education adequacy litigations have occurred almost simultaneously since 1989.”).

established, every other aspect of the education system—including teacher training, teacher certification, curriculum frameworks, textbooks and other instructional materials, and student assessments—must be revamped to conform to these standards. The aim is to create a seamless web of teacher preparation, curriculum implementation, and student testing, all coming together to create a coherent system which will result in significant improvements in achievement for all students.¹⁸⁵

Leaving aside the success or failure of the No Child Left Behind Act itself, James Liebman and Charles Sabel claim that movements for this kind of standard-setting and performance-monitoring at the community level allowed courts, wary of the dangers of structural reform, to meaningfully participate in ensuring educational adequacy.¹⁸⁶ On their account, multiple community stakeholders began to support standards-based accountability systems in response to common dissatisfaction with public schools. At the same time, courts generated additional pressure from above by adjudicating state constitutional rights to an adequate education, finding that schools were not meeting constitutional standards. The combination of pressures, they argue, allowed courts to meaningfully participate in ensuring educational adequacy and avoiding the dilemma of dictating the content of educational adequacy or withdrawing from the debate entirely.¹⁸⁷

According to Liebman and Sabel, adequacy-based school finance litigation helped contribute to the creation of experimentalist governance structures in Texas and in Kentucky. In the series of decisions that have come to be known as “the *Edgewood* saga,”¹⁸⁸ the

185. *Id.* at 230.

186. *See* Liebman & Sabel, *supra* note 8, at 289.

187. *Id.* at 280–81.

188. In *Edgewood Indep. Sch. Dist. v. Kirby*, the Texas school system was declared unconstitutional. 777 S.W.2d 391 (Tex. 1989) [hereinafter *Edgewood* I]. In *subsequent* cases the court assessed the constitutionality of the resulting legislative responses. *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991) [hereinafter *Edgewood* II]; *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489 (Tex. 1992) [hereinafter *Edgewood* III]; *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717 (Tex. 1995) [hereinafter *Edgewood* IV]. For a thorough discussion of the Texas litigation, *see* J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 *Yale L. & Pol’y Rev.* 607 (1999) (detailing Texas litigation challenging the constitutionality of state public school funding).

Texas Supreme Court ruled Texas' school financing system unconstitutional for its failure to create an "efficient system of free public schools" to ensure a "general diffusion of knowledge" as required by the Texas constitution.¹⁸⁹ Rather than attempt a positive definition of "efficiency," however, the court simply said what efficiency was not, threatening to shut down the schools until the legislature came up with a satisfactory solution.¹⁹⁰ Lawmakers operating in a climate hostile to wealth redistribution had a hard time coming up with a financing scheme that satisfied the court as well as their constituents.¹⁹¹ In the various cases, the legislature's finance reform laws were rejected time and again. Only when the legislature coupled finance reform with Senate Bill 7,¹⁹² an accountability system that provided for standards and monitoring while allowing richer districts to supplement beyond well-specified (however rolling) minimum standards,¹⁹³ did the court finally find that the legislation passed constitutional muster. By approving procedures that generated the standards rather than setting them itself, the court was able to avoid defining "an adequate education." Although *Edgewood* has been criticized for falling short of equalizing funding for all schools,¹⁹⁴ the court addressed the content of an adequate education right in a way that it had previously refused to do. It did so indirectly, however, by approving an ongoing means of creating that content.

Once the accountability scheme was in place, the trial judge was able to determine based on evidence at trial that each child would require \$3500 in funding and that the financing scheme in Senate Bill 7 provided enough, without requiring the poorer districts to tax at a higher rate.¹⁹⁵ Had it not been for the detailed accountability regime, which the court agreed met the legislature's

189. *Edgewood I*, 777 S.W.2d at 397.

190. *Id.* at 399.

191. Farr & Trachtenberg, *supra* note 188, at 647–48.

192. 1993 Tex. Gen. Laws 1479.

193. For a description of the details of the accountability scheme, see Liebman & Sabel, *supra* note 8, at 239–50.

194. See Farr & Mark Trachtenberg, *supra* note 188, at 687 (arguing that the *Edgewood* rulings and subsequent Texas cases do not go far enough in correcting funding inequalities).

195. *Edgewood IV*, 917 S.W.2d at 731 n.10.

duty,¹⁹⁶ the court may have felt less equipped to determine the cost of an adequate education.¹⁹⁷

In Kentucky, similarly, the courts' starting point resembled the administrative review approach. In *Rose v. Council for a Better Education*,¹⁹⁸ the Kentucky Supreme Court ruled the entire school system, which rated among the worst in the country, unconstitutional. It set out seven capacities that an efficient school must be designed to provide to each student.¹⁹⁹ In this sense its remedial approach was more substantive than the Texas court's. It also required that the General Assembly monitor the schools "to assure that they are operated with no waste, no duplication, no mismanagement, and with no political influence" and held that the General Assembly bears the sole responsibility for providing funding sufficient to provide each child with an adequate education.²⁰⁰ It expressed that additional money would be required²⁰¹ but did not go so far as to specify how much. Interestingly, it did overrule the trial judge's retention of jurisdiction to oversee the implementation of its orders, citing separation of powers concerns.²⁰²

The Kentucky Education Reform Act (KERA),²⁰³ which has been described as "the most sweeping education package ever conceived by a state legislature[,]"²⁰⁴ passed less than a year after the court's decision in *Rose*. The KERA included performance-based assessments and an accountability system of rewards and sanctions, combined with modification of goals and monitoring tools in light of

196. *Id.* at 730.

197. *See* Liebman & Sabel, *supra* note 8, at 236 (noting that Senate Bill 7 "unblocked the logjam" by increasing funding while conditioning disbursement on performance measures, which helped satisfy the courts that the new proposal would improve the condition of the schools).

198. *Rose v. Council for a Better Education*, 790 S.W.2d 186 (Ky. 1989).

199. *Id.* at 212.

200. *Id.* at 213.

201. *Id.* at 213, 216.

202. *Id.* at 214.

203. Kentucky Education Reform Act of 1990, 1990 Ky. Acts 476 (codified as amended in scattered sections of Ky. Rev. Stat. Ann. Tit. XIII).

204. Molly A. Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 J. Law & Educ. 485, 499 (1999) (quoting *Starting Over*, N.Y. Times, April 8, 1990, at 34).

information generated through monitoring, similar to those in Senate Bill 7 in Texas.²⁰⁵

It is still unclear whether these innovations have increased school quality, or whether they have been thwarted by difficulties such as political will, participation, money, and power.²⁰⁶ Nonetheless, they reveal that courts are willing to support experimentalist-style interventions to press the development of rights to an adequate education and to avoid judicial over-definition of the right. While other courts enforcing SERs have not endorsed such robust experimentalist schemes as those in Texas and Kentucky, the jurisprudence indicates that they might be willing to do so.

C. Experimentalist Leanings in the Judicial Enforcement of Social and Economic Rights in Canada and South Africa

Canadian and South African jurisprudence reveal some sympathy toward comparison and accountability-centered remedies for SER deficiencies. Consistent with the administrative review approach, both show a preference for declaring rights at the high level of generality that the experimentalist model suggests.

Second, both tend to use comparative analyses, looking to the results of similarly-situated, better-performing actors both to gauge the reasonableness of the defendant's choices at the level of detecting violations and in fashioning remedies. Comparative information is used to generate benchmarks as courts look to the results of other jurisdictions' experiments with similar problems to justify judicially-set standards. In *TAC*, for example, the court pointed to the fact that

205. Kentucky Education Reform Act of 1990, 1990 Ky. Acts 476 (codified as amended in scattered sections of Ky. Rev. Stat. Ann. Tit. XIII).

206. Sabel and Simon, *supra* note 8, at 1027, observed in 2003 that "it is too soon to claim that the judicial efforts along these lines have been successes." See also Maurice Dyson, *The Death of Robin Hood? Proposals for Overhauling Public School Finance*, 11 *Geo. J. Poverty Law & Pol'y* 1 (2004) (analyzing Senate Bill 7 and concluding that "only time will tell" if it is successful); Debra H. Dawahare, *Public School Reform: Kentucky's Solution*, 27 *U. Ark. Little Rock L. Rev.* 27 (2004) (analyzing the progress made since the passage of KERA, and cautioning lawmakers not to undermine the implementation of the reforms); Steve Smith, *Education Adequacy Litigation: History, Trends, and Research*, 27 *U. Ark. Little Rock L. Rev.* 107, 114 (2004) ("KERA became a national model for implementing standards-based reforms across the country.").

other provinces had created programs to prevent mother-to-child HIV transmission in support of its view that the defendants could too.²⁰⁷ Similarly, a majority of the Supreme Court of Canada recently ruled that Quebec's prohibition on obtaining private health insurance for publicly insured health services violated the Canadian and provincial constitutional and quasi-constitutional guarantees of security of the person.²⁰⁸ The Quebec government justified the prohibition as a method for protecting the quality of the public system.²⁰⁹ In finding the violation, the Court looked to other jurisdictions, both in Canada and internationally, and thought that they managed to protect their public systems without prohibiting the purchase of the kind of private insurance.²¹⁰

Third, courts have ensured that any remedies are prophylactic. In *TAC*, for example, the court added that the government could still adapt its policy in a manner consistent with the constitution if equal or better methods for preventing mother-to-child HIV transmission became available.²¹¹

Fourth, courts have encouraged broad participation in defining and implementing SERs. In *Grootboom*, the court held that effective implementation would require cooperation between all spheres of government to plan, budget, and monitor the fulfillment of immediate needs and to manage crises.²¹² At the same time, this

207. *TAC*, 2002 (5) SA 721 at para. 123 (finding it "regrettable" that only three of nine provinces have developed treatment programs, and calling for a "concerted, co-ordinated and co-operative national effort" to be made throughout the country).

208. *Chaoulli*, [2005] 1 S.C.R. 791 (Can.). This case is the first in which the Canadian courts have considered the constitutional sufficiency of the public health care system. Although the case concerned guarantees of life and security of the person, which are classified as CPRs, and although the right in issue was framed as a negative right, it presented many of the same justiciability concerns often alleged against SERs.

209. *Id.* at para. 71 (citing respondent's expert witnesses who argued private health insurance would adversely affect public health insurance due to decreases in: (1) "popular support," (2) incentives for influential citizens to require quality control, and (3) the number of doctors in the public health system due to profit motive). *See also id.* at para. 112 (citing Quebec's claim that resources will be diverted from public health insurance when wealthy individuals opt-out).

210. *Id.* at paras. 70–84, 140–49.

211. *TAC*, 2002 (5) SA 721 at para. 135.

212. *Grootboom*, 2001 (1) SA 46 at para. 68.

requirement of participation did not stop the court from holding the state ultimately responsible.

Fifth, courts have recognized that ongoing monitoring, aimed at generating accountability for progress toward goals, is a necessary part of SER enforcement. In *Grootboom*, for example, the Court ordered monitoring by the Human Rights Commission.²¹³

Finally, even in the absence of a specific accountability regime, the government's burden to prove that its policies are reasonably directed to pursuing the full realization of the SER in question encourages collecting information to justify those choices and presenting that information in court.

V. CASE STUDY: POTENTIAL FOR EXPERIMENTALIST REALIZATION OF HEALTH CARE RIGHTS IN CANADA

The recent Supreme Court of Canada case, *Chaoulli v. Quebec*, is an especially ripe opportunity for exploring experimentalist SER enforcement. With the exception of minority language education rights, positive SERs have not been recognized in Canadian constitutional doctrine. In this section, I argue that *Chaoulli* and recent institutional and political developments pave the way for possible judicial participation in experimentalist enforcement of positive SERs in Canada.

In *Chaoulli*, the Supreme Court of Canada struck down a health care law on the ground that it violated the rights to life and to security of the person protected by the Quebec Charter of Human Rights and Freedoms ("Quebec Charter").²¹⁴ Six of seven judges on the Court held that, given wait times in the public system, the prohibition on obtaining parallel private insurance for publicly insured services violated Section 1 of the Quebec Charter.²¹⁵ The six

213. *Grootboom*, 2001(1) SA 46, at para. 97.

214. Charter of Human Rights and Freedoms, R.S.Q., ch. C-12, § 1 ("Every human being has a right to life, and to personal security, inviolability and freedom.").

215. *Chaoulli*, [2005] 1 S.C.R. 791, at para. 45; *id.* at para. 102 (McLachlin, Major, and Bastarache, JJ., concurring); *id.* at paras. 200, 272–73 (Binnie, LeBel, and Fish, JJ., dissenting) (arguing that while some individuals' rights are at risk, the plaintiffs failed to establish any infringement that was not justified under Section 9/1 of the Quebec Charter).

judges who pronounced on whether the law violated Section 7 of the Canadian Charter were evenly split.²¹⁶

Although the claim at issue was a negative rights claim—the litigants sought to strike down a prohibition on obtaining private health insurance, and were not demanding that the government spend more money on health care or reduce wait times—the case raised the same difficulties associated with positive SER enforcement. Similar to the education context, the court had to determine when the public system fell below a constitutional standard, in order to find whether the restrictions barring obtaining insurance for private services interfered sufficiently with the guarantees of life and security of the person. The court’s decision to strike down the insurance prohibition could have had vast policy ramifications.²¹⁷ In particular, the Quebec government argued that the prohibition against private insurance was necessary to prevent the single-tier health insurance system from disintegrating into a two-tier system.²¹⁸ None of the judges could convincingly conclude that this consequence would not arise.²¹⁹ And, as I argue below, the decision of the court revealed deficiencies in the factual record available to the court about whether and how different measures designed to protect the public system actually work.

The judges split on the effects of the private insurance ban and whether it could be justified as a way to protect the public health care system. The judges all agreed that the prohibition on private insurance, at least in some cases, violated the rights to life and security of the person (or in Justice Deschamps’ analysis of the Quebec Charter, to “personal security and inviolability”).²²⁰ The

216. *Id.* at para. 102 (McLachlin, Major, and Bastarache, JJ., concurring); *id.* at para. 265.

217. *Id.* at paras. 107–08 (recognizing the issue is “complex” and “may have policy ramifications”) (McLachlin, Major, and Bastarache, JJ. concurring); *id.* at paras. 161–64 (“The resolution of such a complex fact-laden debate does not fit easily within the institutional competence or procedures of courts of law.”) (Binnie, LeBel, and Fish, JJ., dissenting).

218. *Id.* at para. 108 (McLachlin, Major, and Bastarache, JJ., concurring).

219. *Id.* at paras. 78–83 (examining health insurance systems in states comparable to Canada) (majority opinion); *id.* at paras. 140–49 (comparing the virtues of foreign states’ two-tiered health insurance systems to Canada’s) (McLachlin, Major, and Bastarache, JJ., concurring).

220. *Id.* at paras. 43, 45 (majority opinion); *id.* at para. 124 (McLachlin, Major, and Bastarache, JJ., concurring); *id.* at paras. 200, 205–07) (Binnie,

justices all agreed that ensuring access to quality health care based on need, not wealth, was a valid government objective.²²¹ However, they were unable to agree on whether the measure was justified. The justices differed in their approach, but the problem was the same. Does the prohibition on private insurance really protect the public health care system? Are there other measures available? Who bears the burden of proving the connection between the insurance ban and the protection of the public system?

The various opinions turned on whether the government or the plaintiff bore the burden of demonstrating that the private insurance ban was related to and necessary to protect the public health care system. I argue that this reliance on burdens of persuasion shows that the evidence in the case did not support a judicial resolution of what is and is not necessary to ensure a functioning universal public health care system, and can be viewed as a call to government to better justify how it manages health care resources.

Justice Deschamps placed the burden on government to justify the law, having found that it violated the rights to life and security in the Quebec Charter. Section 1 of the Quebec Charter provides that “every human being has a right to life, and to personal security, inviolability, and freedom.”²²² Justice Deschamps found that the provision was violated because some patients risk death or suffer physical and psychological pain as a result of waiting times.²²³ The burden then shifted to the defendant, the government, which then had to demonstrate that the legislation served a pressing and substantial objective; and if so, that the legislation was rationally connected to that objective, that it minimally impaired the protected rights, and that its objectives were proportionally related to its goal.²²⁴ She rejected the government’s justifications, which included

LeBel, and Fish, JJ., dissenting).

221. *Id.* at para. 56 (majority opinion); *id.* at para. 155 (McLachlin, Major, and Bastarache, JJ., concurring); *id.* at para. 169 (Binnie, LeBel, and Fish, JJ., dissenting).

222. Charter of Human Rights and Freedoms, R.S.Q., ch. C-12, § 1).

223. *Chaoulli*, [2005] 1 S.C.R. 791 at paras. 40, 42.

224. *Id.* at paras. 48, 60. Justice Deschamps emphasized at para. 60: “The burden of proof does not rest on the appellants. Under s. 9.1 of the Quebec Charter, the onus was on the Attorney-General of Quebec to prove that the prohibition is justified. He had to show that the measure met the minimal

concerns that those using private insurance would have less incentive to invest in the public system over time, that physicians would leave the public system in order to make more money in the private system, and that insurers would reject the most acute cases, leaving them to the public system.²²⁵ Justice Deschamps found that there was insufficient evidence to support these concerns,²²⁶ emphasizing once more that, “the appellants did not have the burden of disproving every fear or every threat. The onus was on the Attorney-General of Quebec to justify the prohibition.”²²⁷

Justice Deschamps reasoned, “[t]here is other evidence in the record that might be of assistance in the justification analysis,”²²⁸ and discussed measures adopted by other provinces to protect the public system without a ban on private health insurance, some of which used other methods, like restrictions on doctors, to protect the public system, and three of which are open to the private sector. She concluded,

[T]he variety of measures implemented by different provinces shows that prohibiting insurance contracts is by no means the only measure a state can adopt to protect the system’s integrity. In fact, because there is no indication that the public plans of the three provinces that are open to the private sector suffer from deficiencies that are not present in the plans of the other provinces, it must be deduced that the effectiveness of the measure in protecting the integrity of the system has not been proved.²²⁹

She then conducted a similar analysis of legislation in other OECD countries, drawing a similar conclusion: “A measure as drastic as prohibiting private insurance contracts appears to be neither essential nor determinative.”²³⁰

Justices McLachlin, Major, and Bastarache, concurring, agreed with Justice Deschamps that the anti-insurance provision unjustifiably violated the Quebec Charter.²³¹ They also held that the

impairment test.”

225. *Id.* at paras. 63–66, 74.

226. *Id.* at paras. 64, 66.

227. *Id.* at para. 68.

228. *Id.* at para. 69.

229. *Id.* at para. 74.

230. *Id.* at para. 83.

231. *Id.* at para. 102.

law violated the rights to life, liberty, and security of the person enshrined in Section 7 of the Canadian Charter. Under their analysis, the benefit of the doubt, given the dearth of evidence about the effects of the anti-insurance provision, went to the government once again. This was so despite the fact that the burden of proof formally fell on the applicants to show that the provision both violated the rights to life, liberty, and security of the person *and* that it did so in a way that violated the principles of fundamental justice.²³²

Section 7 of the Canadian Charter differs from Section 1 of the Quebec Charter in that it is qualified. It states that “everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Under Section 7, the claimant bears the burden of proving both that there has been a deprivation of life, liberty and security of the person *and* that the deprivation violated the principles of fundamental justice.²³³

The McLachlin trio concluded that the claimant had met its burden. Like Justice Deschamps, it found that the anti-insurance law violated the rights to life, liberty, and security of the person by requiring people to undergo serious physical and psychological suffering, even risking death, while on waiting lists.²³⁴ The relevant principle of fundamental justice the McLachlin trio identified was that a deprivation of life, liberty, or security of the person must not be arbitrary.²³⁵ Relying on previous jurisprudence, Chief Justice McLachlin and Justice Major stated that an arbitrary law is one that “bears no relationship to, or is inconsistent with, the objective that lies behind it.”²³⁶ They added a new qualification to the rule, however, that “in order not to be arbitrary, the limit on life, liberty

232. *Id.* at para. 131.

233. *See, e.g., R. v. Malmö-Levine*, [2003] 3 S.C.R. 571 at para. 83 (Can.) (citing *R. v. Mills* [1999] 3 S.C.R. 668 at paras. 65–67) (explaining that in contrast to Section 1 of the Charter, “it was affirmed that under s. 7 it is the claimant who bears the onus of proof throughout. It is only if an infringement of s. 7 is established that the onus switches to the Crown to justify the infringement under s. 1.”).

234. *Chaoulli*, [2005] 1 S.C.R. 791 at paras. 122–24.

235. *Id.* at para. 129 (citing *Malmö-Levine*, [2003] 3 S.C.R. at paras. 594–95).

236. *Id.* at para. 130 (citing *Rodriguez v. British Columbia (A.-G.)*, [1993] S.C.R. 519, para. 594 (Can.)).

and security requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts. *The onus of showing a lack of connection in this sense rests with the claimants.*²³⁷

It would seem to be a difficult, if not impossible, burden to require that the claimants show the *absence* of connection between the anti-insurance provision and the viability of the public health care system. Nonetheless, Chief Justice McLachlin and Justice Major concluded that the claimants had met their burden of showing such an absence of factual connection.²³⁸ All the arguments about how prohibiting insurance protects the public system were merely theoretical, they concluded, and no evidence from other jurisdictions showed that prohibiting private health insurance does anything to protect the public system.²³⁹ After a cursory review of other countries' health care systems, the McLachlin trio concluded that because those other countries don't prohibit private insurance and yet appear to maintain healthy parallel public health care systems, Quebec's insurance prohibition bore no relationship with protecting the public system.²⁴⁰ Under the McLachlin trio's paradoxical analysis, this small amount of evidence seems sufficient for the claimants to discharge their "burden." I would argue that if a shortage of proof falls to the favor of the claimants, then the burden is effectively shifted to the government, contrary to the McLachlin trio's assertion that the claimants bear the burden of demonstrating that the insurance prohibition was arbitrary.

The three dissenters, Justices Binnie, LeBel, and Fish appear to have more faithfully applied the burdens of proof. They expressed doubt as to the Court's competence to deal with such a complex fact-laden policy issue.²⁴¹ Nonetheless, they ran the analysis through and

237. *Id.* at para. 131 (emphasis added).

238. *Id.* at para. 152. Colleen M. Flood and colleagues observe: "[I]t does not seem that the applicants in the *Chaoulli* decision had to do more to satisfy this burden than refute the evidence of the government witnesses called to satisfy the majority." Colleen M. Flood et al., *Finding Health Policy 'Arbitrary': The Evidence On Waiting, Dying, And Two-Tier Systems, in Access to Care, Access to Justice: The Legal Debate over Private Health Insurance in Canada* 296–306 (Colleen M. Flood et al. eds., 2005).

239. *Chaoulli*, [2005] 1 S.C.R. 791 at paras. 135–38.

240. *Id.* at paras. 140–49.

241. *Id.* at para. 164.

concluded that even though there could be a violation of life, liberty, and security under certain circumstances,²⁴² the principles of fundamental justice were not violated because claimant (who bore the burden) could not show on the facts that the law is arbitrary. They defined arbitrariness differently from the McLachlin trio—in their view, it was not enough to show that the prohibition was unnecessary to protect the public system. Rather, the ban simply had to be related to the protection of the public system to not be arbitrary.²⁴³ The dissenters stated that those who design public institutions can't always predict when their measures cross the line from reasonable to unreasonable,²⁴⁴ so they deserve a margin of appreciation. Moreover, they accepted the arguments dismissed by the majority as theoretical, finding that there was sufficient empirical evidence to justify the connection between the insurance ban and the protection of the public health care system.²⁴⁵ Finally there was factual disagreement with the majority: the dissenters were of the view that in other countries that have some privatization, such as the UK and Australia, the public system suffers for it.²⁴⁶ In the face of that evidence, in their view, the ban could not be considered arbitrary.

The decisions can be explained as turning largely on what happens in the absence of facts, or in the presence of disputed facts about the relationship between private health insurance and a well-functioning public system. According to the majority, the lack of conclusiveness of the facts worked to the benefit of the claimants. According to the dissent, it worked to the benefit of the government.

The *Chaoulli* decision has been analyzed as a call to government to reduce wait times and improve accountability within the public health care system.²⁴⁷ First, the decision is, strictly

242. *Id.* at para. 191.

243. *Id.* at para. 234.

244. *Id.* at para. 276.

245. *Id.* at para. 258.

246. *Id.* at para. 254.

247. See generally David Hadorn, *The Chaoulli Challenge: Getting a Grip on Waiting Lists*, 173 *Can. Med. Assoc. J.* 271 (2005) (reading *Chaoulli* as encouraging development of objective criteria for the proper limits of what may be reasonably guaranteed by public health care); Patrick Monaghan, *Chaoulli v. Quebec and the Future of Canadian Health Care: Patient Accountability as the Sixth Principle of the Canada Health Act* (Nov. 29, 2006) (unpublished address, 15th Annual C.D. Howe Institute Benefactors Lecture) (available from CD Howe

speaking, binding only on Quebec. Though four of seven justices found a violation of the Quebec Charter, the justices split three-three on whether the Canadian Charter was violated. Moreover, the justices in the majority called on the government to provide better justification for the anti-insurance provision, grounded in facts.

Justice Deschamps stated:

because there is no indication that the public plans of the three provinces that are open to the private sector suffer from deficiencies that are not present in the plans of the other provinces, it must be deduced that the effectiveness of the measure in protecting the integrity of the system has not been proved. The example illustrated by a number of other Canadian provinces casts doubt on the argument that the integrity of the public plan depends on the prohibition against private insurance.²⁴⁸

She later added, “[i]t cannot be said that the government lacks the necessary resources to show that its legislative action is motivated by a reasonable objective connected with the problem it has undertaken to remedy.”²⁴⁹ She further invited government response by discussing the complementary roles played by courts and legislatures that engage in dialogue to determine the content of constitutional norms.²⁵⁰ Finally, in her most explicit call for government accountability, she stated, “the government cannot argue that the evidence is too complex without explaining why it cannot be presented. If such an explanation is given, the court may show greater deference to the government.”²⁵¹ Although she did state that “[t]his is not a case in which missing scientific data would allow for a

Institute) (predicting that future court decisions will be unable to deny the logic of *Chaoulli* that an interest in a public health care system cannot override an individual right to seek timely private care). Cf. Colleen Flood, *Just Medicare: The Role of Canadian Courts in Determining Health Care Rights and Access*, 33 *J. L. Med. & Ethics* 669, 676 (2005) (describing equivocally that “*Chaoulli* is a strong signal to governments that unless they run publicly-funded Medicare well the courts will not tolerate constraints on patients who wish to ‘go private’” and that “on the other hand, [*Chaoulli*] is not doing much to improve the quality of decision-making either; it is not sending signals to decision-makers that they must be fair, open, and transparent”).

248. *Chaoulli*, [2005] 1 S.C.R. 791 at para. 74 (emphasis added).

249. *Id.* at para 87.

250. *Id.* at paras. 89–90.

251. *Id.* at para. 92.

more informed decision to be made,²⁵² she also emphasized that the decision was a response to government neglect. “Inertia cannot be used as an argument to justify deference.”²⁵³ She concluded that “[t]he government has not proved, by the evidence in the record, that the measure minimally impairs the protected rights.”²⁵⁴

Similarly, Chief Justice McLachlin and Justice Major’s opinion emphasized that theoretical justifications for the anti-insurance provision were insufficient. They relied on evidence from other countries to conclude that there is no real connection between the prohibition on private insurance and a quality public health care system. They did, however, qualify the reliance on that comparative data, stating that “*unless discredited* . . . [it] stands as the best guide with respect to the question of whether a ban on private insurance is necessary and relevant to the goal of providing quality public health care.”²⁵⁵ Thus, the decision in *Chaoulli* could be viewed, in experimentalist parlance, as creating a prophylactic rule: unless and until the government proves that its policies, including the insurance ban, are directed toward maintaining the public health care system, its measures risk being struck down.

If provincial governments were to respond to *Chaoulli* with an experimentalist system that systematically measured universal access to quality health care under different circumstances, facts would be generated to determine what kinds of measures are and are not necessary to protect the public system. All the justices in *Chaoulli* use a comparative methodology, consistent with experimentalist theory, to determine the reasonableness of the insurance prohibition. The problem, however, is that in the various strands of the judgment, nobody has any really useful, comparable data on whether the measures adopted in other states and provinces to protect the public system actually worked. As Colleen Flood and colleagues have observed:

[i]n reviewing the experiences of other jurisdictions, Deschamps J. glides over the health care systems in Austria, Germany, the Netherlands, the UK, New Zealand, Austria and Sweden. Drawing on the Kirby Report,

252. *Id.* at para. 97.

253. *Id.*

254. *Id.* at para. 98.

255. *Id.* at para. 150 (emphasis added).

McLachlin C.J. and Major J. provide a quick tour of the purported benefits of the health care systems of Sweden, Germany and the UK. There is also passing reference to Australia, Singapore and the U.S. They conclude: ‘that many western democracies that do not impose a monopoly on the delivery of health care have successfully delivered to their citizens medical services that are superior to and more affordable than the services that are presently available in Canada.’ But they provide no justification or explanation of the measures or variables considered to reach their sweeping conclusion that the health care systems discussed are ‘superior’ to or more affordable than that of Canada’s.²⁵⁶

Justice Deschamps also notes that many provinces operate public systems without bans on private insurance. But we don’t really know whether the system means lesser wait times. Likewise, Ontario and Manitoba protect their public systems by regulating what physicians can charge.²⁵⁷ Does this work as well as prohibitions on private insurance? In other words, the justices compared the different systems without any performance measures. Flood and colleagues stated: “through their comparative analysis of health care systems, the majority amply demonstrates why courts should be extremely cautious of wading into these difficult areas.”²⁵⁸

An experimentalist system would provide useful facts for proving or disproving government assertions about the value of the insurance prohibition, and a mechanism for governments to be held to account for not taking those facts into consideration. The court might not have found that the prohibition on public insurance was arbitrary or not minimally impairing had the government seriously considered and rejected other measures for protecting the public system as part of a systematic effort to determine best practices for maintaining a quality public system. Indeed, Justice Deschamps placed the burden squarely on government to show minimal impairment, but then clearly adverted to the dialogue between the courts and the legislature, and their cooperation in the molding of constitutional standards. She indicated that she might be willing to

256. Flood et al., *supra* note 238, at 307.

257. Colleen M. Flood & Tom Archibald, *The Illegality of Private Health Care in Canada*, 164(6) *Med. Ass’n J.* 825, 826 (2001), available at <http://www.cmaj.ca/cgi/reprint/164/6/825>.

258. Flood et al., *supra* note 238, at 308.

loosen the minimal impairment requirement where government is not dragging its heels.²⁵⁹

It is important to note here that from an experimentalist point of view, a very strict construal of the minimal impairment test is problematic—how can government experiment with different measures if it must always use the least impairing one? Justice Deschamps seems willing to show greater deference where the government has a good reason why it cannot present evidence and where it can show it needs time to implement a well-designed program.²⁶⁰ A government can more convincingly argue that it needs time to evaluate the effects of different measures if it can show it is in an ongoing process of doing so.²⁶¹ Her problem, it seemed, was with the government's choice to do nothing. An experimentalist system might satisfy a loosened minimal impairment test because it is itself designed to come up with the best practice.

Although the McLachlin trio denied any free-standing, positive constitutional right to health care, it required, rather vaguely, that “where the government puts in place a scheme to provide health care, that scheme must comply with the Charter.”²⁶² The Binnie trio similarly accepted that the rights to life, liberty, and security of the person contained in Section 7 of the Charter could apply outside the traditional spheres of the administration of justice, citing *Gosselin*.²⁶³ In their view, however, the “real control over the scope and operation of Section 7 is to be found in the requirement that the applicant identify a violation of the principles of fundamental justice.”²⁶⁴

An experimentalist system that pursued health-care related goals could be seen as consistent with the principles of fundamental justice. If courts were to accept that experimentalist-style accountability structures were consistent with the principles of fundamental justice, this could provide a sufficient brake on the McLachlin trio's expansive view that any unproven measures that interfere with individual liberty in the health context violate the

259. *Chaoulli*, [2005] 1 S.C.R. 791 at para. 92.

260. *Id.* at para. 94.

261. *Id.*

262. *Id.* at para. 104.

263. *Id.* at para. 196.

264. *Id.* at para. 199.

principles of fundamental justice. With such a brake in place, the reasons for choosing not to find positive rights to health care in Section 7 of the Charter would fall away.

Finally, experimentalist approaches are consistent with the dialogic approach favored in recent Supreme Court of Canada jurisprudence. Where complex questions of social policy design are at issue, courts have shown a preference for declaring rights at the high level of generality that the experimentalist model suggests and inviting legislative responses.²⁶⁵ As discussed previously in this paper, an experimentalist model might allow courts to avoid moving too far beyond that level of generality by approving of procedural accountability structures.

The Canadian social and political context favors the creation of experimentalist mechanisms. The *Chaoulli* decision was rendered in a context, like the American education context, where governments, institutional insiders, and the public are increasingly calling for systematic accountability in terms of access, coverage, level and source of funding, quality of and evidence base for care, cost-effectiveness of current instruments, and existing health disparities within jurisdictions.²⁶⁶ Fooks and Maslove identify citizen engagement, legal approaches, public reporting, and citizen governance as types of accountability mechanisms that have been

265. See, e.g., Kent Roach, *Dialogic Judicial Review and its Critics*, 23 Sup. Ct. L. Rev. (2d) 49 (2004) (outlining the major features of dialogic judicial review in Canada).

266. See, e.g., Roy J. Romanow, Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada* (2002), available at http://www.hc-sc.gc.ca/english/pdf/romanow/pdfs/HCC_Final_Report.pdf (calling for a more comprehensive, accountable national health care system based on Canadian values); Michael J.L. Kirby, Standing Senate Committee on Social Affairs, Science, and Technology, *The Health of Canadians: The Federal Role* (2002), available at <http://www.parl.gc.ca/37/2/parlbus/commbus/senate/com-e/soci-e/rep-e/repoct02vol6-e.pdf> (calling for reform in the Canadian health care system to ensure its sustainability); Kenneth J. Fyke, Commission on Medicare, *Caring for Medicare: Sustaining a Quality System* (2001), available at <http://www.health.gov.sk.ca/medicare-commission-final-report> (recommending an action plan for substantially enhancing the delivery of Medicare services); Premier's Health Quality Council, *Health Renewal* (2002), available at <http://www.gnb.ca/0089/documents/e-phqc.pdf> (suggesting an accountability framework and other governance and structural changes for the health care system in New Brunswick).

called for in recent health care system reviews, including the Romanow and Kirby commission reports²⁶⁷ that were heavily referred to in *Chaoulli*.²⁶⁸ An experimentalist system purports to bring each of these mechanisms into play. Moreover, the Canadian federal structure is well-suited to the creation of systems for parallel experimentation.²⁶⁹

VI. LIMITS OF THE EXPERIMENTALIST MODEL

Despite the theoretical promise of experimentalist approaches for SER protection and the sympathy of courts for experimentalist techniques, there are reasons to doubt that the model will genuinely allow for the protection of a universal right of timely access to quality health care in Canada.

First, government and the public may not create an experimentalist system in response to a court's broad definition of a right, even if the court more explicitly invites one. Experimentalist theory requires that there be some level of consensus that there is a problem and a desire to fix that problem collaboratively. This consensus may be motivated, in part, by common fear of the penalty default—the imposition of a judicial solution—if the accountability system is not adhered to.²⁷⁰ But in fact, at least in the short term,

267. See Romanow, *id.*; Kirby, *id.*

268. Cathy Fooks & Lisa Maslove, *Rhetoric, Fallacy Or Dream? Examining Accountability Of Canadian Health Care To Citizens*, Health Care Accountability Papers No.1, at 1 (March 2004).

269. See Colleen M. Flood & Tom Archibald, *Hamstrung and Hogtied: Cascading Constraints on Citizen Governors in Medicare*, Health Care Accountability Papers No. 6 (June 2005).

270. Sturm, *supra* note 158, at 1437, discusses the incentive structure that gets parties to cooperate and argues that:

[s]uch incentives are often present in the remedial context, where the parties face certain imposition of a court ordered remedy if they are unable or unwilling to deliberate. The defendants have an interest in maintaining some control over the remedial process and avoiding the imposition of a remedy designed unilaterally by the court. The plaintiffs have an interest in involving the defendants in the remedial process because it enhances the likelihood of developing a workable remedy that will be promptly implemented. Nonparties have an incentive to participate lest they be frozen out of a process that will dramatically affect their interests. In contrast, even

some actors might prefer the judicially-imposed solution, for all its flaws. Those who would seek a two-tier health care system in Canada, for example, might prefer *Chaoulli's* "penalty default" of parallel public and private systems.

Even where the parties are committed to experimentalist solutions, and the appropriate architecture is in place or created, experimentalist systems might fail to produce the best possible results. Additional resources might be needed to make the systems work. The existence of an accountability structure will not itself provide the money that may be necessary to support necessary improvements.²⁷¹ Participants, which in an experimentalist health care system would include citizens, consumers, health care professionals, and institutional administrators, may lack the capacity to respond to the information that the accountability system generates.²⁷² Not all units will be operating with the same budget;

limited experience with the adversary process and at the remedial stage teaches that the parties' interests are unlikely to be served through the adversary model. The threat of formal adjudication predisposes participation in deliberation.

Liebman and Sabel similarly admit that a precondition for the creation of accountability systems is the "politically consequential diffusion of a new calculus of consent. People disserved by the current system are sufficiently aggrieved by the resulting costs that it is worth their while to coalesce to disentrench established interests, provided that there is a minimally acceptable prospect of success and accountability." James S. Liebman & Charles F. Sabel, *The Fragile Promise of Provisionality*, 28 N.Y.U. Rev. L & Soc. Change 369, 370 (2003).

271. Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 Harv. J. on Legis. 465 (1991).

272. Martha Minow discusses a similar problem in the educational reform context, remarking that

[e]ven assuming that tests are administered and results come in a timely fashion to teachers, most teachers lack the knowledge and understanding to perform the new role imagined for them. Student test scores offer at best partial evidence about when and how different instructional methods work. Linking test scores to alternative curricular methods and instructional techniques requires levels of knowledge and skill that are not currently well-distributed Analogous . . . problems occur for parents and community advocates; how are they to acquire the capacity to understand and use the testing information to assess, monitor, and improve the schools?

School Reform Outside Laboratory Conditions, 28 N.Y.U. Rev. L. & Soc. Change 333, 336 (2003).

they may not have the money to implement best practices.²⁷³ Impoverished, tired, busy stakeholders may lose the momentum necessary if reforms are to take their knowledge and expertise into account and if capture by the more powerful is to be avoided.²⁷⁴ These problems may be overcome if the state pours sufficient resources into facilitating the functioning of an experimentalist system. But the administrative review approach (as opposed to the case-by-case approach) is most needed where governments are failing to fund SER fulfillment. Resource-related problems are likely to persist within, and undermine, an experimentalist system.²⁷⁵

Experimentalist systems are threatened by difficulties that go beyond funding.²⁷⁶ How can a good health care system be identified? Political pressure to generate results quickly might result in less than effective short-term strategies being favored over better long-term ones.²⁷⁷ The tools used to measure successful programs might be flawed: critics of No Child Left Behind have complained that “teaching to the test” distorts measurements of real educational successes.²⁷⁸ To the extent that experimentalist systems require the

273. *Id.* at 333.

274. *Id.* at 333, 335.

275. Dorf & Sabel, *supra* note 8.

276. See Jacob E. Adams, Jr., *Results or Retrenchment: The Real Race in American Educational Reform*, 28 N.Y.U. Rev. L. & Soc. Change 305, 307 (2003) (arguing that “[a]ccountability systems suffer from principal-agent ambiguity, contested standards, rudimentary accounts, weak technology (that is, tests unable to do the job) difficulty assigning responsibility for results, and conflicts between internal and external (to schools) accountability expectations”).

277. See Terrence J. Sullivan et al., *A Just Measure Of Patience: Managing Access To Cancer Services After Chaoulli*, in *Access to Care, Access to Justice: The Legal Debate over Private Health Care in Canada* 454 (Colleen M. Food et al. eds., 2005) (commenting on the difficulty of setting priorities in prevention and treatment).

278. See James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. Rev. 932, 934 (2004) (arguing that “an accountability system that rewards and punishes schools based on absolute achievement levels will thus reward relatively affluent schools and punish relatively poor ones”). See also William Firestone, *Teaching to the Test in New Jersey: the Good, the Bad, and the Ugly* 1, CEPA Newsletter available at http://www.cepa.gse.rutgers.edu/Old%20CEPA%20Newsletters/CEPA_SP01NEWS.pdf; and Ctr. on Educ. Policy, *From the Capital to the Classroom: Year 4 of the No Child Left Behind Act* 10 (2006), available at <http://www.cepd-oc.org/index.cfm?fuseaction=Page.viewPage&pageId=495&parented=481> (finding that most school districts surveyed have reduced classroom time for subjects

adoption of best practices, there is a risk of encouraging homogenization of practices instead of experimentation.

Ensuring participation is especially problematic when experimentalism is transposed from its place of birth as a business management model into highly contested areas of social policy. Although experimentalist approaches accommodate changes in intermediate goals over time, at any given point it is assumed that there will be “strong points of commonality that dominate the concerns and ethos of the network”²⁷⁹—to maximize profit, to build the best quality product, etc.²⁸⁰ Where complex social questions are concerned, parties are likely to have divergent interests,²⁸¹ which, especially where there are power imbalances among the deliberators, pose serious problems for a consensus-driven process. Deliberators may simply fail to come to any agreement. Networks might not provide a voice for all participants. More powerful groups may wish to exclude the views of relatively powerless minorities (e.g., those who suffer from conditions which disproportionately affect marginalized populations, such as HIV/AIDS) in designing local policy experiments where those views would interfere with the majorities’ countervailing interests and visions of success. Comparison of progress among units may be difficult. The process is less likely to generate clear and comparable results as diverging interests among units may mean that they are not in fact seeking to move toward the same, ostensibly agreed upon goals.²⁸²

In addition, the experimentalist system says nothing about rates of progress. In its effort to avoid setting out the substance of the right itself, experimentalism creates a procedure where the baseline content of a right is set by the unit generating the best possible SER outcomes. Where all the units are lagging in concert, the court should

other reading and math—the subjects that are tested).

279. See, e.g., Helen Hershkoff & Benedict Kingsbury, *Crisis, Community and Courts in Network Governance: A Response to Liebman and Sabel’s Approach to Reform of Public Education*, 28 N.Y.U. Rev. L. & Soc. Change 319, 321 (2003).

280. See Simon, *supra* note 160, at 46.

281. Hershkoff & Kingsbury, *supra* note 279, at 321 (“Corporate investors, for example, deciding whether to relocate to a region, may want state-of-the-art public schools for the children of top management, yet insist on tax abatements that block any but the most modest improvements in schools of the children of factory floor workers.”) (footnote omitted).

282. Minow, *supra* note 272, at 338.

in principle defer, on the theory that the units are expressing their vision of the content of SERs at the time.

Finally, the focus on achieving results may also discourage practices that might have intrinsic or expressive, but not instrumental value.²⁸³ Unmeasurable values abound where SERs are concerned. In the controversy over privatization of health care in Canada, the Romanow Commission found that Canadians found important symbolic value in having a socialized health care system.²⁸⁴ Even if the moral worldview of Canadians could be gauged for its instrumental value (i.e., if it could be demonstrated that the presence of a socialized health care system engendered values that led to better SER realization), an experimentalist system would likely be unable to function effectively on timelines set long enough to measure these kinds of effects.²⁸⁵

Identifying some best practices and distinguishing resource-related problems from design deficiencies may be better than no accountability at all. In other words, an experimentalist system does not have to be working perfectly, with seamless sharing and adoption of best practices, in order to produce better substantive outcomes than ordinary political processes. But should these problems sufficiently cripple the experimentalist project, judicial intervention in dictating substance is arguably justified,²⁸⁶ just as it might be when governments fail to respond to judicial calls for action under the administrative review model.

Since experimentalism eschews traditional substantive notions of rights in that it posits that judges will recognize that the metaphysical project of defining the content of rights is inferior to systematic deliberation, there is no moment internal to the theory when experimentalism can be declared a substantive failure so that judges can impose the penalty default using traditional adjudicatory

283. Hershkoff & Kingsbury, *supra* note 279, at 323 (“[T]he existing literature does not yet show that networks can work well as motors for political community in the sense of identity-maintenance or the transmission of distinct cultures or the protection of disadvantaged groups. Indeed, it seems difficult to design network-type processes and markets in ways that will not intensify the erosion of conventional identity-markers.”).

284. Romanow, *supra* note 266, at xvii.

285. See Jacob Adams, *Results or Retrenchment: The Real Race in American Educational Reform*, 28 N.Y.U. Rev. L. Soc. Change 183 (2003).

286. Hershkoff and Kingsbury, *supra* note 279, at 324.

techniques.²⁸⁷ In fact, judges who are faithful to the experimentalist vision should accept that if governments adhere to the right procedures, then the polity's expression of best practices should be accepted.

Whenever judges are pushed to intervene substantively—because the relevant parties fail to create the experimentalist architecture, because they fail to adhere to it, or because the results fail to live up to judges expectations, the familiar capacity and legitimacy concerns may re-emerge. The retention of the power to impose the penalty default—which is necessary for the courts to play a significant role in pressing for reform—means that more aggressive intervention remains as a possibility.

CONCLUSION

Constitutional, judicially enforceable positive SERs sit poorly with the idea of constitutional rights as absolute trumps, whose exact substantive boundaries are precisely defined and fully enforced by courts. At the same time, modern constitutions increasingly include SER protections in constitutional bills of rights with the intention of constraining democratic decision-making by requiring it to move toward particular outcomes. Very broadly, courts have either haphazardly enforced SERs where they have tried to remain faithful to the rights-as-trumps vision, or have had to move away from the notion that rights can be completely defined and enforced at the judicial level.

This paper suggests that positive constitutional SERs get the most meaningful judicial protection where courts enlist collaboration

287. Jacob Adams states:

Accountability . . . rests on a plausible theory of action, indicating how incentives, accounts and consequences can, in the language of principal-agent theory, induce agents to act diligently while also enabling principals to know the results and to respond accordingly. However, adequacy's theory of action says little more than that resources should be sufficient to accomplish the student performance that states desire. The legal theory establishes new constitutional obligations, but adequacy suits have yet to produce a clear, justiciable standard that enables courts to know adequacy when they see it.

Adams, *supra* note 285, at 307.

with governments and other stakeholders in defining and enforcing all dimensions of the rights. There is a range of available options for collaborative realization, all of which are designed to allow courts to require action while avoiding too much involvement in substantive policy-making and priority-setting. Courts can hope to engender SER values and sporadically enforce them by treating SERs as nonjusticiable guiding principles of interpretation. They can declare the broad content of rights without issuing orders and injunctions. They can declare the broad content of rights and require government to demonstrate that it is making reasonable progress toward them. They can issue specific injunctions and orders where they can competently and legitimately do so.

None of these options entirely eliminates the possibility of a standoff between a court committed to SER protection and a government dead-set against it. As long as judges have the power to superintend the substance of government policy, the capacity and legitimacy concerns associated with the enforcement of costly, positive SERs will persist at some level. Where governments fail to respond to judicial invitations for collaboration, courts will be tempted to intervene more aggressively. But each tool may be a useful way to tap into whatever potential energy exists within the polity toward SER fulfillment. Methods, like the experimentalist ones, that lead judges away from substance and toward procedural review and that generate the kind of information that might prompt political action create intermediate steps that might hold off more aggressive judicial articulation and enforcement of substantive aspects of rights. Where governments fail to create the court-invited accountability systems or where those systems are captured by more powerful actors or do not function effectively, courts might legitimately be drawn toward more aggressive substantive intervention. But where those systems function well, even if they do not yield progress to the satisfaction of judges' preferences, they may be a better way of tapping into society's level of commitment to SER norms than majoritarian politics alone.

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